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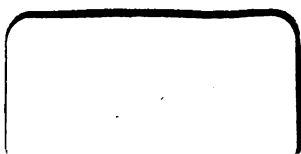
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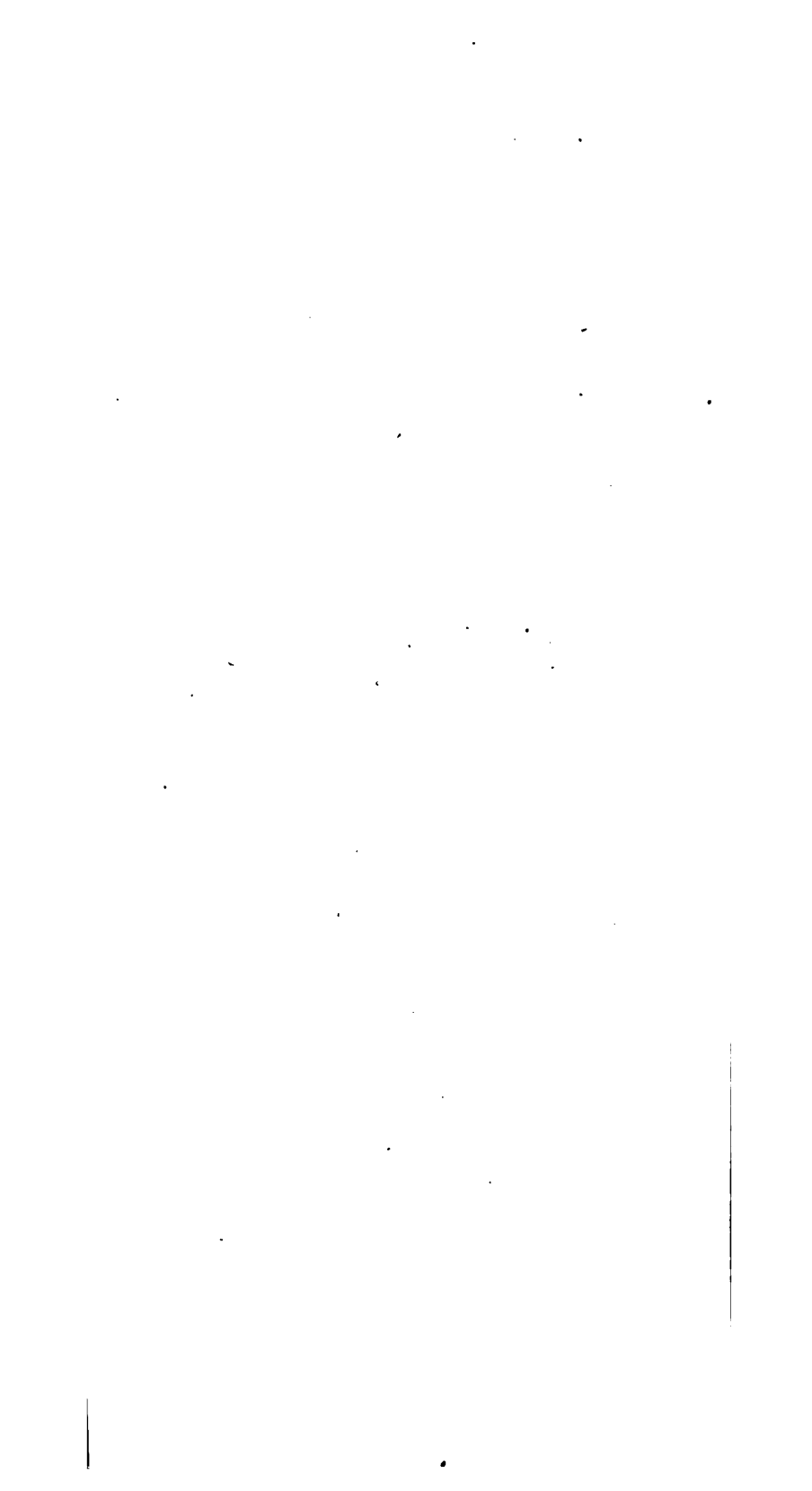














THE  
**AMERICAN DECISIONS**

CONTAINING ALL THE

**CASES OF GENERAL VALUE AND AUTHORITY**

DECIDED IN

**THE COURTS OF THE SEVERAL STATES**

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO  
THE YEAR 1860.

COMPILED AND ANNOTATED BY

**JOHN PROFFATT, LL. B.,**

*Author of "A Treatise on Jury Trial," etc.*

**Vol. VI.**

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## PREFACE

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THE sixth volume of the American Decisions is now issued, within a year from the commencement of the series; and without presumption, attention may be drawn to the progress thus attained in a publication, which, on account of its magnitude and importance, has attracted very general interest. It may be pardonable to refer to the announcement made when the enterprise was started, and respectfully claim that the publishers and the editor have fully redeemed their promises to the profession, in the issue of the volumes already published, as in the style and character of the publication. For myself, I may be permitted to say, that feeling encouraged by the laudable enterprise of the publishers, and the cordial and general recognition given to the work by the profession, I have been stimulated and encouraged to put the greatest amount of labor and research in the work, to make it worthy of the patronage of the profession, and to justify the large investment of the publishers.

The past year has enabled us to perfect our arrangements, and has given us such experience and facilities that we are now prepared to issue more rapidly the succeeding volumes of this series, without reducing the standard or character of the work. Indeed, relying on a competent and faithful corps of assistants, on valuable experience already acquired, and the generous support and aid of our subscribers, we can give the assurance of greater accuracy, fuller annotations, and a higher standard than ever before.

J. PROFFATT.

SAN FRANCISCO,

December, 1878.

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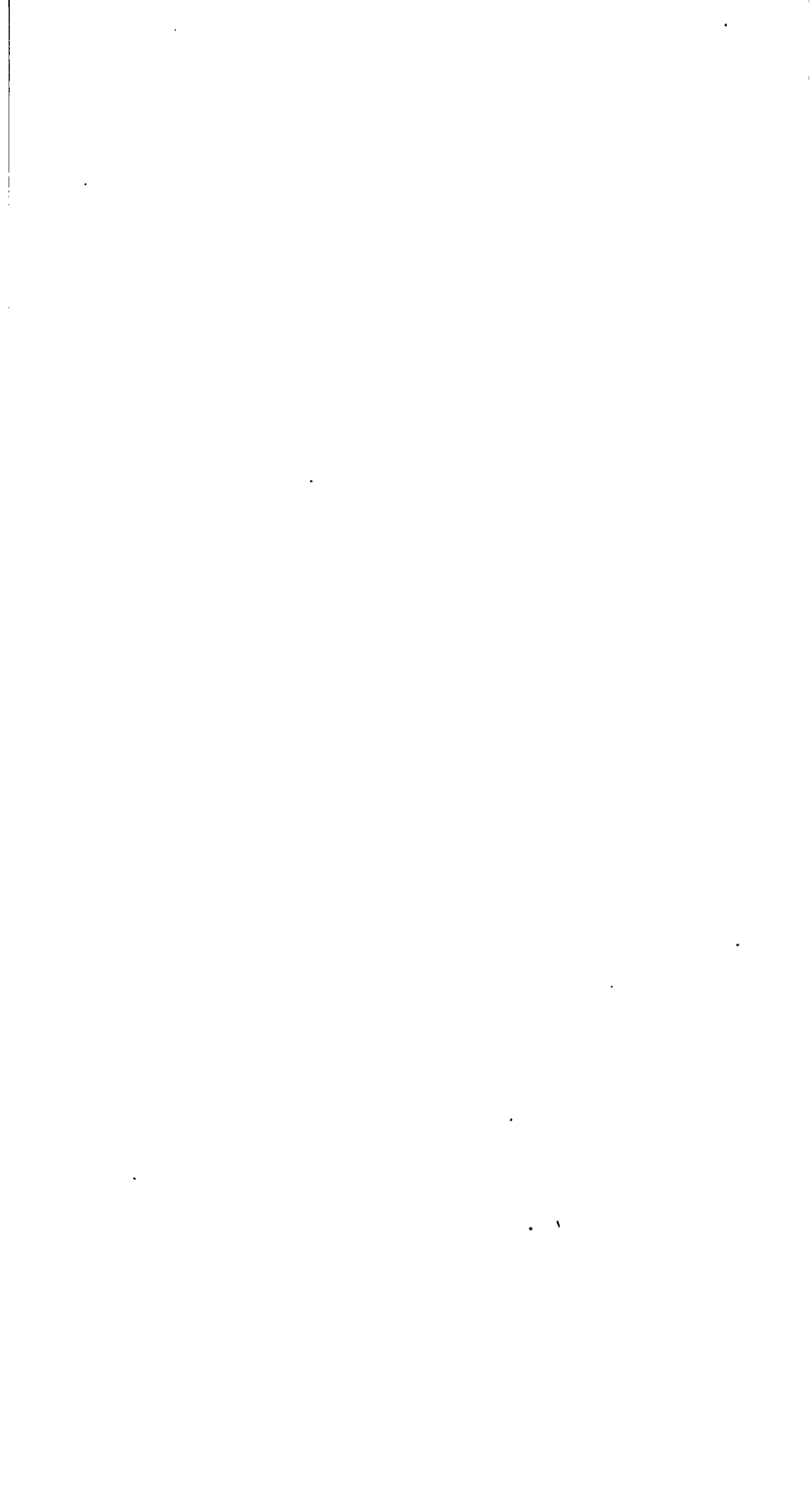
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**AMERICAN DECISIONS.**  
**VOL. VI.**



**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MASSACHUSETTS.**

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**SPRING v. TONGUE.**

[9 MASS. 22.]

**INCUMBRANCE.**—Where a pew in a meeting-house recently built was transferred, with a covenant that it was free from all incumbrances, it was held, that the liability of the pew to an assessment to defray the expenses of building the meeting-house was not an incumbrance within the meaning of the covenant.

**ACTION** for breach of covenant in defendant's deed. It was agreed that the defendant executed to the plaintiff a deed of the moiety of a pew in a certain church, with covenants of seisin, against incumbrances, right to convey and warranty; that, after the sale, the directors levied an assessment upon the pew for a deficiency in the funds for building the meeting-house; that defendant paid the same, and that no part of the sum so paid was for any expense arising on the house after the deed declared on was made. The case was submitted upon this agreed statement.

**By Court.** We cannot consider this as an incumbrance for which the defendant is liable in damages. The facts must have been equally known to each of the parties. The damage to the plaintiff arose from the diminished value of the pews in the general estimation. Had the proceeds of the sale of the pews exceeded the cost of the house, the plaintiff would have had his proportion of the benefit. The loss, therefore, is properly his. Plaintiff nonsuited.

## PORTER v. HILL.

[9 Mass. 24.]

**CONVEYANCE BY JOINT TENANT.**—One joint-tenant cannot convey a part of the joint estate by metes and bounds to a stranger. One entering under such a conveyance cannot become a disseisor of the other joint-tenants; for one joint-tenant cannot be disseised by a stranger unless all are disseised. The grantor could not be disseised, as the grantee entered by his consent. The grantee in such a conveyance, therefore, gains no seisin, either by right or by wrong.

**EFFECT OF RECOVERY FOR BREACH OF WARRANTY.**—A grantee of land who recovers judgment and satisfaction against the grantor for a breach of the covenant of warranty, cannot afterwards recover the land granted on the grantor's acquiring a more perfect title.

**ENTRY SUB DISSEISIN.** The demandant relied upon his own seisin within thirty years, and alleged a disseisin by John Pitts, who demised to the tenant. The jury found a special verdict containing the following facts: John Tyng being seised of a certain tract of land, including the premises in question, sold the same to Nason and Bradstreet, in joint-tenancy, who subsequently mortgaged the same to Tyng to secure the payment of a certain bond. Prior to the execution of the mortgage the grantees made a partition by parol, followed by a several occupancy, and on the same day Nason conveyed to the demandant in fee-simple with the usual covenants, a portion of the land in his, Nason's, several occupancy. This deed to the demandant was not registered until after the registry of the mortgage. Subsequently Bradstreet conveyed to the demandant the other parcels of land demanded in fee; and, after this conveyance, Bradstreet released to Nason all his interest in the lands which Tyng had conveyed to them in joint-tenancy. The demandant brought an action against Nason on a breach of his covenants, and recovered judgment for the amount of the purchase-money and damages. After the recovery of this judgment, which was also posterior to Bradstreet's release to Nason, the latter conveyed all his interest in the lands conveyed by Tyng, to one Sullivan, who on the next day transferred the same to Pitts. Having recovered judgment on the bond, for which the mortgage was given, Pitts, as Tyng's executor, discharged the judgment upon the conveyance from Sullivan, and demised the demanded premises to the tenant.

The points raised are stated in the opinion.

*King*, for the demandant.

*Mellen*, for the tenant.

By Court, PARSONS, C. J.:\* Two principal points arise out of the facts found by the jury in this case; one as to the parcels claimed by the demandant under Bradstreet's deed to him; the other as to the parcel which the demandant claims under Nason's deed.

As to the first, nothing passed by Bradstreet's deed. The partition made by the joint-tenants, by parol, is void, as within the statute of frauds; and, notwithstanding their subsequent several occupancy, they remained jointly seised in fee-simple, as they are to be considered as having the legal estate against all persons but the mortgagee [See, in point, *Porter v. Perkins*, 4 Am. Dec. 52]. And one joint-tenant cannot convey a part of the land, by metes and bounds, to a stranger. If he could, his grantee would become tenant in common of a particular part with the other joint-tenant, who, in making a legal partition, might, notwithstanding, have the whole of the part thus conveyed assigned as his property. The entry of the demandant under Bradstreet's deed gave him no seisin, but he was a mere several occupant. Nor can he be considered as a disseisor of Bradstreet, as he entered by his consent; and he could not be a disseisor of Nason, for one joint-tenant cannot be disseised by a stranger of any particular part, unless all the joint-tenants are disseised. From the verdict, therefore, it does not appear that the demandant was ever seised of the parcels described in Bradstreet's deed, consequently Pitts did not disseise him, and he can not recover his seisin in this action. His remedy must be against Bradstreet, on his covenants.

The like difficulty meets the demandant on the second point. His conveyance from Nason is of a particular part by metes and bounds, before partition was made between the joint-tenants. But it is said for the demandant, that as Nason afterwards redeemed the mortgage, by satisfying the judgment, he and all those claiming under him are estopped from denying that an estate in fee passed by his deed. What might have been the force of this observation, if the demandant had not recovered judgment against Nason for the breach of his warranty, and obtained satisfaction, it is now unnecessary to decide. When a warrantee in *warrantia chartas* recovers, and his seisin of other lands of the warrantor to the value, he can not afterwards recover of the warrantor the lands warranted. For

\*The opinion was drawn up by the chief justice, who was unable to be present, during this term, from indisposition.

although the warrantor can not aver against his own deed, yet the warrantee may aver against that deed; and if his averments are verified by matter of record, the warrantor may afterwards avail himself of that record against the warrantee, the record being of a higher nature than a deed.

If, therefore, the demandant had, after his judgment and satisfaction, sued Nason for the land, the latter might have defended himself by showing that judgment which had falsified his deed. And as the demandant could not recover the land against Nason, after he had redeemed the mortgage, so he cannot recover against any persons who claim under Nason, and are thus privies in estate to that judgment. The tenant is entitled to judgment on the verdict.

Costs for the tenant.

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The doctrine of this case in regard to the inability of a joint-tenant to convey his interest in the joint estate by metes and bounds, is not generally adopted: See Freeman on Co-tenancy sec. 199 *et seq.*

In *Gates v. Salmon*, 35 Cal. 588, it is denied, the court saying: "An exception to this is found in *Porter v. Hill*, 9 Mass. 34, in which it is held that one joint-tenant cannot convey a portion of the premises to a stranger, and the reason given is: 'that if he could his grantee would become a tenant in common of a particular part with the other joint-tenant, who in making a legal partition, might, notwithstanding, have the whole of the part thus conveyed assigned as his property.' This doctrine cannot be sustained. The reason given is the very contingency, subject to which, as it is said in *Stark v. Barret*, 15 Cal. 368, the grantee takes his conveyance of the specified parcel. In *Bartlett v. Harlow*, 12 Mass. 347, the court in citing the decision in *Porter v. Hill*, that one joint-tenant cannot convey any specific part of the land to a stranger, adds, 'at least not so as to prejudice his co-tenant.' The doctrine that one tenant in common may convey a specific part of the general tract, subject to the contingency mentioned is affirmed in *Varnum v. Abbot*, 12 Mass. 474, and many other cases in that state."

The doctrine of the principal case is noticed in *Blossom v. Brightman*, 21 Pick. 283, where premises were claimed under the levy of an execution against tenants in common. The execution was levied upon the undivided interest of the debtors in two parcels of land described by metes and bounds, and constituting a part only of the estate devised to them as tenants in common. The court say: "To allow and give legal effect to such alienation of the interest of a tenant in common in a part of the tenement thus held, either by deed or levy of execution, without the consent of the other co-tenants, would be to create new tenancies in common, in tracts and parcels of the estate held in common, to their injury, and is contrary to the rules of law," citing principal case and *Bartlett v. Harlow*, *supra*. The same doctrine is affirmed in *Brown v. Bailey*, 1 Met. 257, on the authority of the principal case.

In *De Witt v. Harvey*, 4 Gray, 486, following *Varnum v. Abbot* and *Blossom v. Brightman*, it is held that a conveyance by a tenant in common of a portion of the estate in severalty is invalid as against his co-tenants and can be avoided by them, but it is nevertheless good by way of estoppel against

the grantor and his heirs, and is valid against all persons unless avoided by the co-tenants.

The ground of the decisions is thus stated by Shaw, C. J. in *Adams v. Briggs Iron Co.*, 7 Cush. 369: "The ground upon which the doctrine is established is, that a tenant in common of an entire estate is entitled, on partition, to have his property assigned in one entire parcel according to his aliquot part. The respective co-tenants may convey their shares to one or many grantees, as they please, so it be of the entire estate; because whether there be one or many co-tenants, each may still have partition, which is inseparably incident to an estate in common, and have it in one parcel and of the like kind and quality with the estate which he holds in common."

The doctrine on this subject cannot be better summarized than we find it in 1 Washburn on Real Prop. 417. It is there said: "Although each tenant in common has so general a power of alienation of his share, and may convey any aliquot portion of his share, yet as a general proposition, he may not convey his share in any particular part of the estate so held by metes and bounds, if objected to by his co-tenant, though it would be valid and effectual as against himself and all persons claiming under him. And the reason is, that such a conveyance impairs the rights of his co-tenant in respect to partition. Instead of giving him his share together in one parcel, by a single partition, it would require him to have several, and to take his share in as many distinct parcels. And, by analogy, the same rule applies when the share of a tenant in common is set off to satisfy an execution against him. The grantee of a specific portion of a larger joint estate or the levy of an execution on such portion conveys no interest in common to the grantee or creditor in the general estate. Thus, where one tenant in common of a larger lot conveyed sixty-four rods thereof, it was held to pass nothing, it being without bounds, and not to be held in common with the lot generally."

In Ohio and Maryland, a tenant in common may convey his share in a particular part of the estate, and a levy may be made in the same way: *Trecon v. Emerick*, 6 Ohio, 391; *Reiswicker v. Smith*, 2 Harr. & J. 421; so in Missouri, *Barakart v. Campbell*, 50 Mo. 597.

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## BEARCE v. BARSTOW.

[9 Mass. 45.]

**INTEREST TO CONSTITUTE USURY.**—A person being indebted to another in a sum upon which usurious interest was paid, it was agreed that a debtor of the former should assume this obligation. Accordingly, this party gave his promissory note to the creditor of the former for the debt, including the usurious interest, the amount of which note was, however, less than his own indebtedness, he paying the balance to his creditor, and being thus released. In an action upon this note, it was held that the transaction was not usurious, the jury finding no intent or contrivance to evade the statute.

**ASSUMPSIT** by the payee of a promissory note against the maker. It appeared that one Byram was indebted to the plaintiff in certain notes for money loaned, on which illegal interest was paid to the plaintiff, but not included in the notes. The defendant

being indebted to Byram in a sum greater than the latter's indebtedness to the plaintiff, it was agreed by the parties that the defendant should execute to plaintiff a note for the amount due plaintiff from Byram, and account to the latter for the balance due him. The note in question was accordingly executed for an amount which included interest at the rate of twenty-four per cent. per annum, and the balance due Byram paid by defendant. Lawful interest was reserved upon this note.

The jury were instructed that, unless they were satisfied that the arrangement was made with a view to evade the statute against usury, and that the arrangement was in contemplation and intended, at the time the original notes were given by Byram for the money loaned him, to elude the statute, the verdict ought to be for the plaintiff. The verdict being for the plaintiff, defendant excepted.

*Mellen*, for the defendant, cited the statutes of 1783, c. 55; *Cuthbert v. Haley*, 8 T. R. 390; *Tate v. Wellings*, 3 T. R. 531; *Whitman and Culler*, *contra*, relied upon *Turner v. Hulme*, 4 Esp. 11.

SEWALL, J. The only question necessary to be decided in this case is, whether the clause cited from the statute against usury, relied on for the defendant, is at all applicable to this case, as we must understand it, upon the facts stated, and the verdict found under the direction given by the justice who presided at the trial.

The English statutes against usury contain a similar clause for the avoidance of usurious contracts, expressed nearly in the same terms, and entirely of the same import, as the clause in our own statute, relied on for the defendant. The construction there is, as appears by numerous decisions, that the objection of usury, to avoid a contract, must be made to the security or promise, whereupon or whereby illegal interest has been taken or reserved, and by a party otherwise liable therein: *Whelpdale's case*, 5 Rep. 117; Bull. N. P. 224. It is a remedy provided for his defense, to which he may resort if he pleases; and when he insists upon the objection, to avoid the usurious contract itself, and maintains by proper evidence, the law will not suffer the contract to be enforced against him, for the benefit of the original creditor or any other person. A renewal of the contract between the same parties, and every species of contrivance in the modification of any loan or contract, for the purpose of evading the statute, being cases within the mischief, are also

within the remedy. But where the party liable upon a usurious contract will not avail himself of the remedy provided by the statute, for the purpose of avoiding it—where he voluntarily discharges it, or suffers a judgment to be recovered upon it, or makes it the consideration of a contract entirely new, as being with a third person not a party to the original contract, or to the usury paid or reserved upon it, or as combining other parties and considerations, and not being a contrivance to evade the statute—there the provision no longer applies. Money paid upon a usurious contract is not to be recovered back—a judgment upon a usurious contract is not, for that objection, to be avoided—and when made the consideration for another contract, it is neither an illegal nor a void consideration.

In the case at bar the plaintiff, as the creditor of Byram, was a party to a usurious contract, which has been paid or satisfied in part by the defendant's note. This payment, therefore, Byram cannot recall; and much less shall the defendant be allowed to avail himself of a transaction so remote, where he has suffered no loss or injury, to defeat his voluntary contract, given for a just and valuable consideration, and in discharge of his debt to Byram. It is nothing to the defendant to what use or purpose his creditor has disposed of the demand against him, which is liable to no objection of usury, and which, being due from him, has been legally transferred and made the consideration of the note in suit. Every supposition of contrivance to evade the statute against usury is negatived by the finding of the jury, under the particular direction upon the point by the justice who presided at the trial.

By Court. Judgment on the verdict.

In *Green v. Kemp*, 13 Mass. 515, this case is cited to show that the statute of usury is for the protection of debtors, and must have a construction conformable to this object. The doctrine of the principal case is relied upon also in *Cook v. Dyer*, 3 Ala. 646; and in *Reading v. Weston*, 7 Conn. 413, the case is cited as establishing that one, not a party to a usurious contract, may not, for this cause, invalidate it. To the same point, also in *Lowell v. Johnson*, 14 Me. 242; *Stanley v. Kempton*, 30 Me. 120; *Allison v. Barrett*, 16 Iowa, 280. As to the principle laid down, that the plea of usury is not a good defense, where the defendant has waived the remedy provided by law, and suffered judgment to pass by default, or has substituted a new security therefor, this case is referred to at length in *McArthur v. Schenck*, 31 Wis. 680; also in *Tait v. Hannum*, 2 Yerg. 355; *State Bank of Elizabeth v. Ayers*, 7 N. J. L. 134; *Richardson v. Field*, 6 Me. 39; *Wales v. Webb*, 5 Conn. 161; *Botsford v. Sanford*, 2 Conn. 280.

The principal case is further cited in *Campbell v. Sloan*, 62 Pa. St. 485; *French v. Rowe*, 15 Iowa, 572; *Dis v. Van Wyck*, 2 Hill, 524; *Little v. White*, 6 N. H. 279; *Steele v. Franklin*, 5 Id. 377; *Gibson v. Stearns*, 3 Id. 188.

## SMITH v. MAYO.

[9 MASS. 62.]

**LIABILITY OF INFANT.**—An infant gave his promissory note for a valuable consideration, but not for necessities, and paid a part before his coming of age. After coming of age, he made a will and therein directed his just debts to be paid. In a suit against the executors, they were held not liable to pay the balance due.

**ASSUMPSIT** on a promissory note made by the defendants' testator. At the time of making the note the testator was a minor, but it did not appear that it was given for necessities. The plaintiff, the payee, relied upon a clause in the testator's will, which was made shortly after he arrived at full age, providing for certain dispositions of his property, "after my just debts shall be paid, which I direct first to be done." Forty dollars had been paid by the testator before he came of age, and was indorsed on the note.

*Todd*, for the plaintiff, contended that, as the testator had retained that for which the note was given, after arriving at full age, the note was binding: 3 Bac. Ab. 611, 612; 3 Burr. 1719, 1794; 1 T. R. 648; 2 Id. 159, 766; 2 H. Bl. 511.

*Hopkins, contra.*

By Court, PARKER, J.: In this case, the note declared on was made during the minority of the testator, and it is not stated that the consideration for the promise was necessities for his maintenance and support.

The action is attempted to be supported solely on the ground that the will, which was made after the testator attained to full age, contains a direction to pay his just debts; and it may be presumed, although it is not so stated, that the note declared on was given for a just debt. The only case analogous to this is in chancery, where, it appearing by the will that the infant devised his personal estate for the payment of his debts, particularly those he had set his hand to, it was decreed that a bond debt, contracted while he was an infant, should be paid: Ab. Eq. Ca. 282. But at common law, it has been settled, in a great variety of cases, that a direct promise, when of age, is necessary to establish a contract made during minority, and that a mere acknowledgment, as in cases under the statute of limitations, will not have that effect: 2 Esp. 628; and it has further been decided that such promise must be made deliberately, and with a knowledge that the party is not liable by law: 5 Esp. 102;

Cro. Eliz. 126, 700; 3 Esp. 159; 1 T. R. 648. We cannot consider the expression in this will as amounting to such a promise. It was made some time after the testator came of age, and it may have had reference to debts contracted after that period. At any rate, it contains a direction to pay only just debts; and there is nothing in the case, from which we can infer that what was not in law a debt, could be considered by the testator as a just debt. There are, undoubtedly, cases in which persons apparently of man's estate, and engaging in business usually transacted by persons of ability to contract, lead unsuspecting creditors into difficulty, and oftentimes into distress; and these cases, individually considered, wear the appearance of hardship. But the general policy of the principle of law, which authorizes an infant to avoid a contract, cannot be disputed. The experience of ages has proved its utility. The readiness of young persons to engage themselves in burdensome contracts without sufficient consideration, and of older ones to take advantage of their inexperience, would produce general mischief in the community, did not this wholesome principle interpose to produce a degree of caution in looking to the character of those with whom they deal; and although particular instances of hardship may be lamented, the general policy of the law must be enforced. Judgment, in the case before the court, must be entered for the defendants.

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*See Martin v. Mayo, post.*

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### ILSLEY v. STUBBS.

[9 MASS. 65.]

**RIGHT TO STOPPAGE IN TRANSITU.**—A firm in Portland shipped certain goods in their vessel to a Liverpool firm on current account. The latter, on receipt of the cargo, on which they made advances pursuant to agreement, wrote to the Portland firm that they would find freight or ship a return cargo. They accordingly put on board a cargo shipped on account and risk of the Portland firm, bills of lading being signed by the master, deliverable to the said firm, and the goods were charged to their account. Previously to the shipping of the return cargo, the Portland firm had executed a bill of sale to the plaintiffs, purporting to convey all the cargo then consigned as aforesaid. The vessel being detained by contrary winds after the shipment, the Liverpool firm heard of the failure of the Portland firm, and thereupon, by certain threats, induced the master to give up the bills of lading (excepting one which he delivered at Portland, which was indorsed to the plaintiffs) and to sign other bills deliverable to the defendant or assigns, their agent. It was held in replevin, that the defendant must recover, as the Liverpool firm had so far a control

over the goods after they had been placed on board, and the first set of bills of lading had been signed, as to give them a right to change their destination, or they might at least stop them in their transit; and that if the bill of sale to the plaintiffs could, in any event, operate to pass the property in the return cargo, it must be subject to the claims of the Liverpool firm.

REPLEVIN for a quantity of salt and coals. It appeared that Weeks & Son, of Portland, shipped merchandise in their vessel, the *Henry*, to Logan, Lenox & Co., of Liverpool; that there was an agreement between the two firms, dated November 4th, 1807, stating the terms on which the latter would receive consignments and make insurance, and limiting the former's drafts to the amount of the consignment; that the consignment was received by the Liverpool firm, who put on board the *Henry* a cargo of salt and coals, shipped on the account of Weeks & Son, and bills of lading were signed by the master, agreeing to deliver the cargo to Weeks & Son; that after the shipment the vessel was detained by contrary winds, and Logan, Lenox & Co., having heard of the failure of Weeks & Son, compelled the master, by threatening to stop the vessel if he refused, to sign other bills of lading, deliverable to the defendant, the agent of Logan, Lenox & Co.; that the master signed such bills of lading and delivered the first bills, except one, to Logan, Lenox & Co.; that this reserved bill was delivered to Weeks & Son, and by them indorsed to the plaintiffs, to whom Weeks & Son had previously, and a few days prior to the shipment of the return cargo, executed for a valuable consideration a bill of sale, purporting to convey "all and singular the contents of the cargo now on board of the ship *Henry*, of Portland, Joseph Weeks, master, now on a voyage to Liverpool and back to the United States."

Upon these facts a verdict was taken by consent for the defendant, subject to the opinion of this court.

*Whitman*, for the plaintiffs.

*Mellen and Emery*, for the defendant.

SEWALL, J.: The general question to be decided in this case is, does the evidence establish the property of this cargo in the plaintiffs, claiming it under the bill of sale executed at Portland, on the eighth of January, 1808? As to the effect of the bill of sale, restricting its operation to the words of it, there would be no question; for, literally taken, the cargo claimed under it had no existence at the time of the bargain and transfer, under

which the plaintiffs claim. But this is not the construction to be put upon a contract of this kind. As between Weeks & Son and the plaintiffs, the bill of sale undoubtedly gave the latter a right to take to their own use whatever articles did or should constitute the homeward cargo of the ship *Henry*, when she should return from the voyage in which she was then engaged; that is, such lading as she should have, which, independently of the bill of sale, would have been the property of the owners of the vessel, a sense latterly, and not incorrectly, given to the term cargo, as exclusive of any other lading, or goods taken on freight. The bill of sale may be considered as establishing an unquestionable claim and right against them, or any interest they might have in a cargo afterwards arriving in the ship *Henry* from Liverpool. When, however, the question of property is with third persons, it may be necessary to examine the case with more strictness. And in deciding between parties, whose interests are not distinguishable in equity, the question may ultimately turn upon the nicest formalities of legal title. Strictly speaking, then, the contract between Weeks & Son and the plaintiffs gave them but a chose in action, and was rather a covenant than a sale. As transferring an expectation or demand against the correspondents of Weeks & Son, their factors at Liverpool, the vendors of the cargo to be shipped there, the bill of sale must be considered subject to all the rights and duties of the original parties to the shipment, when it should be made; the shippers and master acting without notice of the transfer at Portland. The rights of the shippers or vendors of the cargo are not to be affected by the bill of sale, and the property acquired by it is not to be carried beyond the legal demands of Weeks & Son, or their rights in the property in question, against the firm of Logan, Lenox & Co. The defendant in this action represents them, and all their rights, opposed to the claim of the plaintiffs, are to be allowed to him.

In this view of the case, the other circumstances and facts in evidence became material to the decision.

The agreement made for Logan, Lenox & Co. with Weeks & Son, dated November 4, 1807, which may be considered as resulting in the consignment of the ship *Henry* to them, if relied on for the plaintiffs as evidence of any contract to send them return cargoes for vessels consigned to the house of Logan, Lenox & Co., is very deficient in that respect, and not at all suitable to the purpose. It not only expressly negatives any intention of advancing for consignments, but it contains no

stipulation, engaging them absolutely to the purchase of return cargoes, even when supplied with funds. But what is more material, the ship *Henry* was not consigned to them for the purpose of obtaining a return cargo. To the extent of her outward cargo, or, as it proved, much exceeding the proceeds of it had been drawn and accepted, and the vessel was placed entirely in the control of Logan, Lenox & Co., to be employed by them on a freight or charter party, if to be obtained; and a cargo of salt was only to be resorted to if nothing better could be done. The testimony of the master was, that he had no power to dispose of either ship or cargo, but was to follow the orders of Logan, Lenox & Co. in all things concerning the voyage; and in their letter, under date of December 28, 1807, after the arrival of the *Henry* at Liverpool, they undertake to get a charter for the vessel, if possible, and only to send a cargo of salt if nothing better could be done.

Until the departure of the vessel, therefore, she continued under their control, and the cargo was subject to their orders. And their power was not determined by a shipment intended for Weeks & Son, if afterwards a shipment for some other account, or upon a charter or freight, appeared to them advisable. The first bills of lading were evidence of an intention, which, until the departure of the vessel, Logan, Lenox & Co. had authority to reconsider and reverse; and this authority they exercised in canceling them, and substituting other bills of lading, which placed the articles of the cargo on freight, instead of being on account of the owners of the ship. Their authority in this respect was not impaired, nor was the determination on their part unjust or improper, because it became necessary as a measure for their own security, upon an intended advancement, after the credit of Weeks & Son had become doubtful. Besides, the first bills were canceled with the consent of the master—a consent in which he was entirely justified, being conformable to the duties of his owners and employers. This was a restoration of property, which they could not, with any sense of justice, insist upon retaining, at the certain expense and loss of their correspondents. If under similar circumstances, and at the instance of Logan, Lenox & Co., and their threatening to stop the vessel by virtue of their control and authority over the voyage, the master had relanded his cargo, and returned empty, is it possible to conceive that the bill of sale at Portland would have a given right of action to the plaintiffs against Logan, Lenox & Co. for the value of the cargo shipped, or intended to

be shipped, but finally restored, for the best of all reasons, viz., that the purchasers, those to whom it was going on credit, had no ability of paying for it, if they should take it? And how does the reversal of the bills of lading differ materially from the case supposed? If this reasoning is correct, there is no occasion of resorting in this case to the doctrine of stoppage *in transitu*. For Weeks & Son, as consignees, or for their assigns under the bill of lading, there never was a cargo in the ship *Henry in transitu*; the authority of Logan, Lenox & Co. to reverse their intention, and their doing this, and substituting the second bills of lading, was tantamount to a restoration of the property intended to be shipped for Weeks & Son; and it must be considered as shipped from the beginning for another account. Their authority to demand a restoration, and that of the master to consent to it, were not restricted by the contract with the plaintiffs, unknown to those who were acting at Liverpool under an apprehension of an important change in the circumstances of Weeks & Son, which proved to be well founded. This becoming known to their correspondents, seasonably to enable them to provide for their own security, the provision was made, and was justifiable upon the principles of good faith and mercantile honor, and was, I think, legally effectual against the claim of the plaintiffs.

As a question of fact upon the whole evidence, whether the shipment for the account of Weeks & Son had been finally cancelled, or was only colorably changed, some doubt might be excited from the circumstance of the account produced by one of the firm of Logan, Lenox & Co., at the reference between them and a third party, containing the charges of the salt and coals to Weeks & Son. But this doubt is removed by the testimony of the same witness, of the manner in which that account was obtained, and the actual state of it as a memorandum only; and that it had never constituted an account rendered and had never been offered as an existing demand. And although this might be a question rather for the jury than the court, yet, in the actual state of the evidence, a conclusion upon it for the defendant must be the only correct result, so far as the case is affected by that circumstance. With the aid, however, of the doctrine of stoppage *in transitu*, the question in this case may be more conclusively, and with some more satisfactorily, decided. According to this rule of the law merchant, which has become engrafted with the common law, the shipper or consignor of goods, sent upon a general or particular credit, as upon an order

for a return cargo, when there is no specification, or a specific order and purchase of the articles shipped, has a right, in the event of an actual failure of the consignee or purchaser, to countermand the delivery and cause them to be delivered to himself or to some other for his use; and this right ceases only with the *transitus* or passage of the goods, upon an actual or constructive delivery thereof to the consignee himself. A foreign merchant, who, for a commission only to himself, purchases upon his own credit, and ships upon the credit which he gives to his employer, is a consignor or vendor entitled to the benefit of this rule. Nor is the application of the rule to be restricted to those cases where the contract of sale, as between the consignor and consignee, is to be considered executory; as where the consignee or vendee has not obtained upon the credit afforded him, what is, by the principles of the common law, a vested property. On the contrary, this is supposed; and the restrictions upon the exercise of this right, established by English decisions, have been derived from mercantile usages, sanctioned by their expediency and by principles of public policy, or by the precautions suggested by the system of the bankrupt laws. In itself, and as determining a question of right between the parties to the contract of sale, the rule is perfectly equitable and just in every case of the actual insolvency of the consignee; and it has been allowed to be exercised even where a part of the price had been paid, or a bill of exchange for it accepted and indorsed over to a third person: Abbott on Shipping, c. 9, p. 357, Amer. ed.; 3 East, 93; 1 H. Bl. 365, note a; 6 East, 27, 28; 7 T. R. 440.

When it is that the *transitus* is at an end, and a delivery has taken place, has been a question of some difficulty in particular cases. By one decision, goods have been considered *in transitu* notwithstanding a delivery to the master of a ship chartered solely by the consignee. In another case, where the goods attempted to be reclaimed had been delivered to the master of a ship, chartered solely by the vendee for a term of years, and were put on board thereof, destined by him on a particular adventure, for which they had been purchased, it was holden that the vendor could not stop them. The distinction in these two cases, upon which these different decisions rest is, as I apprehend, the circumstance of the ultimate destination of the consignment; for, in both cases, the consignee was the owner of the vessel; in one case, for the term of years; in the other case, for the voyage; so that this was not the ground of decision, as Abbott, in citing the cases, seems to suppose; but, in the one

case, the goods had reached the constructive possession of the owner, the *transitus* was at an end, and the further direction of the goods had been determined by the vendee; whereas, in the other case, the *transitus* continued, the goods had not arrived to the possession of the owner, actual or constructive, considered as a termination of their passage from the vendor to the vendee: *Stubbs v. Lund*, 7 Mass. 453 [5 Am. Dec. 63].

In the case at bar, the assignee was the owner of the vessel, on board of which the articles, the property whereof is in question, were laden. And it is to be supposed, in making this question, that they had been delivered to the agent of the consignee for his account and risk; but the delivery was for the purpose of carriage to him, and the vessel itself, and the master, at the time the delivery was countermanded, were still under the direction of the consignor. The goods constituted a cargo on its passage to the vendee, to give the fullest effect to the first bills of lading that can be contended for. The right to stop them, therefore, proving the actual failure of the consignee, seems to result from a reasonable construction and application of the rule on this subject; and both the right and the exercise of it are, in our opinion, established by the whole evidence, not only against any claim of the consignee, but also against the claim of his assigns, under the deed to them, made prospectively, and, in fact, before the shipment; for which the consignor was not engaged by any previous promise or consideration. The assignment relied on for the plaintiffs is not a bill of lading in the possession of the consignee; and the case is not, therefore, to be decided by the usage found by the jury in the ultimate decision of the case of *Lickbarrow v. Mason*, 5 T. R. 686; 1 Bos. & P. 563, if indeed a similar usage within this state is provable in any case.

Upon the whole, the opinion of the court is in favor of the defendant, and judgment is to be entered upon the verdict taken for him, for the return of the articles replevied, with his damages and costs.

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See *Stubbs v. Lund*, 5 Am. Dec. 63.

## JOHNSON v. REED.

[9 Mass. 78.]

**MUTUAL PROMISES—CONDITION PRECEDENT.**—In mutual promises, where money is to be paid on a day certain, and the performance by the other party is to take place on the happening of a certain event contemplated to take place before the day fixed for the payment of the money, and the event happens accordingly, the party failing to perform has no right of action for the money.

ACTION on the case, in which the plaintiff declared upon the following written agreement:

“Memorandum of an agreement made between Jacob Johnson, on the one part, Abraham Reed and Daniel Cummings, on the other, witnesseth, that the said Reed and Cummings do engage to pay the said Johnson, on or before the first day of September next, all and the full sums he, the said Johnson, shall recover of Thomas Millett; and the interest is to begin at this date. And the said Johnson engages to let them have all the advantage of the demands he is entitled to. September 13, 1808. Jacob Johnson, Abraham Reed, Daniel Cummings.”

It appeared that the plaintiff obtained judgment in the action against Millett and sued out execution thereon on the fifth of December, 1808, but held the same in his hands until the attachment which had been levied on Millett's property, by virtue of the original writ, was lost, hoping to set off the execution against one which Millett held against him. In January following, the plaintiff offered the execution to the defendant Cummings, demanding a promissory note for the amount of the judgment, which defendants would not give. In March ensuing, the plaintiff again offered the execution to the defendants, without requiring a note; but they refused to accept it, as the attachment on the original writ was lost. A verdict was found for the defendants, whereupon the plaintiff excepted.

*Whitman*, for the plaintiff, contended that the promise of the defendants was absolute, without condition precedent or subsequent: *Campbell v. Jones*, 6 T. R. 570; *Martindale v. Fisher*, 1 Wils. 88; *Nicholas v. Rainbred*, Hob. 88; *Beany v. Turner*, 1 Lev. 293.

*Longfellow and Cutler*, contra, contended that defendants' promise was conditional, and that the plaintiff had not performed the condition upon which the promise depended: *Worsley v. Wood*, 6 T. R. 720; *Thorpe v. Thorpe*, 1 Salk. 171.

By Court, PARKER, J.: Whether the verdict in this case is right, depends upon the construction of the writing upon which the action is brought, which, by the plaintiff, is considered to be evidence of mutual and independent promises, and by the defendants, to contain evidence of a promise on their part, dependent only upon a due performance of the promise of the plaintiff to them. The facts in evidence so clearly show a want of justice in the plaintiff's demand, that his counsel has been necessarily driven to some technical rules for the support of the action. Johnson refused to let the defendants have what they had promised to pay him for, and yet insists upon the price. But it is contended, and it is expected to support the action upon this ground, that where there are two promises, one appearing to be in consideration of the other, each party may enforce his promise against the other, whether his own promise has been performed or not; and authorities have been cited in support of this position, which go far to maintain it. The position, as laid down in the authorities, occurs principally on questions relating to covenants; but doubtless the same principles will apply to the construction of promises. It is, that in covenants which are independent, either party may enforce his remedy for a breach, whether his own covenant be performed or not; but that, in covenants which are dependent, an averment of performance, on the part of the plaintiff, is necessary in a declaration for a breach by his covenantor. This principle is disputed nowhere; but, in the construction of covenants, there has been considerable difficulty heretofore in ascertaining whether they were dependent or independent. In the case of *Thorpe v. Thorpe*, cited at the bar, from Salkeld, it is declared by Lord Holt, that "where a certain day of payment is appointed, and is to happen subsequent to the performance of the thing to be done by the contract, performance is a condition precedent, and must be averred in an action for the money." This doctrine is reasonable; for it seems to be unjust that a man, who has bargained for a thing, shall be obliged to pay for it, when he may never get the thing he pays for. "Every man's bargain," says Lord Holt, "ought to be performed as he intended it. When he relies upon his remedy, it is but just he should be left to it according to his agreement; but, on the contrary, there is no reason a man should be forced to trust, where he never meant it; and therefore, if two men should agree, one that the other should have his horse, the other that he will pay ten pounds for him, no action lies for the money till the horse be delivered."

Upon the principles of this case, there is no difficulty in deciding the nature of the promises now in question. The money stipulated by the defendants was to be paid on a day certain, and the thing to be done by the plaintiff was intended to have been done before that day arrived. The substance and effect of the plaintiff's engagement is, that he will assign over his demand, whether existing in action, judgment or execution, to the defendants. The action was pending at the time of the promise, and the judgment and execution were obtained several months before the day of payment stipulated by the defendants. Now, it could surely never have been contemplated by the parties to this contract, that, if it was in the power of the plaintiff to perform his promise before the day arrived for the payment of the sum for which the promise was the consideration, he might neglect to do what he had engaged, and yet exact a performance of the other party; and this after a refusal of performance on his part, and after he had, by his own negligence, rendered himself unable, at any future time, to perform his promise. There have been, however, many cases decided, which establish very strict principles in the construction of covenants, and, perhaps, may be considered as applying to promises. In one case, of modern date, it was decided that, if a man covenants to work upon a house, and the owner covenants to pay him by installments, and that the last installment shall be paid when the house is finished, the workman may recover the last installment, whether the house shall be finished or not: *Terry v. Duntze*, 2 H. Bl. 389. This seems to be turning a man's contract into something totally different from his words and intentions in the contract; and yet, in the same book, it is said that the intent of the parties is to govern in the construction of the covenants. The principal reason given for this decision is, that some of the installments were to be paid before the house was finished. But, because a man had engaged to pay one a certain sum of money before his house was finished, therefore he should be held to pay another sum, which he had not engaged to pay until his house should be finished, seems to be very questionable as a logical, whatever it may be as a legal, conclusion.

The cases of *Goodisson v. Nunn*, 4 T. R. 761; *Campbell v. Jones*, cited in the argument, *Glazebrook v. Woodrow*, 8 T. R. 366; and *Heard v. Wadham*, 1 East, 619, all show a disposition on the part of the judges, to break through the bonds which some old cases had imposed upon them, and to adopt what Lord Kenyon, in one of the cases, calls the common sense doctrine,—that the

true intent of the parties, as apparent in the instrument, should determine whether covenants or promises are independent or conditional, instead of any technical rules, of which the parties were totally ignorant, and the application of which would, in most cases, utterly defeat their intention. Now, in the case at bar, the defendants promise the plaintiff that they will pay the amount, which he shall recover of Millet, by a certain day, putting the day off so far as to leave no doubt that judgment would be previously recovered; and, in the same instrument, the plaintiff promises the defendants to let them have all the advantage of the demands that he is by law entitled to. What is the meaning of this, but that the defendants are to have an assignment of the judgment and execution, if necessary, as soon as obtained? Suppose the question had been put, at the time, by the defendants to the plaintiff: What if you, when you obtain your judgment, refuse to let us have the execution, until the benefit of the attachment shall be lost? Would not the plaintiff's answer have been, Why, then, you will not be obliged to pay the consideration? This contract, then, if it is construed according to the true intent and meaning of it, as entertained by the parties, must be considered as containing promises by both parties, dependent upon each other; and it would be idle to permit the plaintiff to recover in this action, when, at the time of the commencement of his suit, he had not only refused to perform his part of the engagement, but had disabled himself from performing it, by holding his execution against Millett until the attachment was lost, and so the judgment had probably become of no value. This decision is not opposed to the most approved of the old cases, and is conformable to the more liberal doctrine, maintained of late, relative to the construction of contracts. In the case of *Thorpe v. Thorpe*, it is stated that, "in executory contracts, if the agreement be that one shall do an act, and for the doing thereof the other shall pay, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money until the thing be performed for which he is to pay." It is true that, in the promise declared on in the case under consideration, a certain day is appointed for the payment; and that the thing to be done by the plaintiff might, by possibility, not have been in his power to perform before the day of payment; it might have happened that the plaintiff's judgment would not have been recovered until after the day of payment had arrived. But it did, in fact, take place before, and it was contemplated by the

parties that it would, and that seemed to be the basis of the defendant's promise; and the plaintiff might, and ought to, have delivered the execution, or tendered it without conditions, to entitle himself to this action.

There is a further ground upon which we are clear that the plaintiffs ought not to have a verdict in the present action. All executory contracts may be rescinded by the parties to them, they continuing interested until the agreement to rescind be made. Now, this case shows acts and declarations by both parties, from which it was competent for the jury to decide that there was a mutual agreement to put an end to the contract; and those facts were submitted to the jury upon this very point.

The plaintiff, having obtained an execution against Millett, instead of passing it over to the defendants, according to his agreement, kept it in his own hands, endeavoring to use it for his own purposes by offsetting it against an execution which Millett had against him. In so doing, he had voluntarily broken his contract; and this being assented to by the defendants, in resisting the payment of the money when it became due according to the terms of the contract, and on the very ground that the consideration had failed, it would be idle to suffer the plaintiff now to recover, when the very recovery would give the defendants a right of action against the plaintiff for the same sum which should be recovered against them. In every view, therefore, we think the verdict right, and that a new trial ought not to be granted.

Judgment according to the verdict.

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## MANLY v. UNITED MARINE AND FIRE INS. CO.

[9 Mass. 85.]

**COMMENCEMENT OF RISK.**—An insurance was made on a vessel for one year, "commencing the risk at B, on a day certain at noon," and it happened the vessel had left the port of B. on the day preceding, but was in good safety at sea on the day fixed, and was afterwards lost within the year. The underwriters were held, nevertheless, liable.

**ACTION** upon a policy of insurance dated January 24, 1811, on the schooner Jason, "to, at and from one or more ports on the globe for one year, commencing the risk at Barbadoes on the seventh day of December, 1810, at twelve o'clock at noon of said day," etc. The facts appear from the opinion.

*Mellen and Todd*, for the plaintiff.

*Whitman*, for the defendants.

By Court, SEWALL, J.: In this action a loss is averred and proved, for which the defendants are liable, if, under the circumstances of the case, the policy had attached. The insurance was, by the terms of the policy, to commence at Barbadoes on the seventh day of December, at noon. According to the statement of facts agreed by the parties, the vessel had sailed from Barbadoes on the sixth, and on the seventh was in good safety near the Island of St. Vincent, on her voyage to Carthagena, and on the eleventh suffered shipwreck on the Island of Aves, and was lost.

The defendants resist the demand for this loss, upon the ground that the policy never attached, the vessel having left Barbadoes before the seventh, and not being, at the hour appointed for the commencement of the insurance, at the place where the risk is by the policy said to have commenced. At the time the policy bears date, neither party knew on what day the vessel had sailed from Barbadoes. But a newspaper, produced by the president of the insurance company, contained intelligence of her having sailed on the eighth of December, and the plaintiff had a letter from his master dated the fifth, informing him that she then lay at Barbadoes, bound to Carthagena; and by this intelligence the time and place of commencing the risk, as stated in the policy, were determined; not, however, with any distinct view to the place, but merely regarding the time; the insured expressing an unwillingness to include in the policy any time, during which the safety of his vessel was ascertained.

The doctrine that the risk undertaken in a policy of insurance is to be described with suitable and convenient certainty, and that the insurers are not liable for a loss incurred in any voyage or risk, materially different from the risk described, will not be disputed. Where the insurance is upon a particular voyage or voyages, there is, generally speaking, no reference to any time when the risk is to commence, or is expected to terminate. The *termini* of the risk are the place from and the place or places to which the vessel is bound. These are to be expressed in the policy; and if left in uncertainty by any omission or blank, and when either proves to have been mistakenly, or untruly, or deceitfully stated, the insurance fails, the policy is void. When the insurance is for a term of time, the *termini* of the risk are the day and hour when the insurance commences, and when it ter-

minates, which last may be expressed by the term of its continuance; and to state the place where the risk shall be understood to have commenced, or where the vessel shall be when it terminates, is unusual, and, considering the uncertainty incident to the subject, would be inconvenient, and render the existence of the contract uncertain, if the parties were thereby authorized to insist upon an exact coincidence of time and place. In the most common cases, such a coincidence, in either form of insurance, is immaterial, and of no importance in estimating the risk insured, especially where the provision includes a period of time, and every place, without exception.

There are cases of insurance, where partial stipulations, to exclude from the risk certain times and places, have been found necessary; as, in assurances of vessels at and from the West Indies, a warranty or condition is inserted, that the vessel shall sail from the port or island where the risk commences, by a certain day, which is expressed for the purpose of excluding the hurricane months, a season of extraordinary hazard in the West Indies. And there is no doubt but a failure in a stipulation of that kind puts an end to the contract, however immaterial to the risk the circumstance provided against may prove to have been, or however accidental or unavoidable the failure. The question, therefore, in the case at bar, is whether the provision in this policy, for commencing the risk at Barbadoes on the seventh of December, is to be understood as a warranty or condition that the risk shall commence there, to the effect of excluding every other place where the vessel might happen to be on that day. If that is the construction which must be given to this contract, then the insurance never commenced. The insurance in the case at bar being for a term of time, the risk is described with sufficient certainty. The moment of time when, to the amount insured, the risk belonged to the insurers, and the term for the continuance or duration of their undertaking, are precisely stated. As the insurance has effect, without any regard to place, in every part of the globe, for that term of time, there is no statement of any particular voyage or voyages, and the parties had no regard to any. What is said of the continuance during the voyage, and of the termination of the risk by an arrival and mooring twenty-four hours in safety, is plainly inconsistent with the general intent of the parties to this contract. If a question had arisen on this policy respecting the termination of the risk, it would have been impracticable, I think, to give any meaning or effect to those words; for their

operation must be, either to curtail the year to the last arrival of the vessel at some port where she had moored twenty-four hours in safety within the year, or to extend the term of the insurance to the next subsequent arrival after the year had expired. Either construction would be contradictory to the other provisions of this contract; and to give effect to the general intent of the parties, this inconsistent particular intent, if the words had any meaning, must be rejected. The introduction of this absurdity probably arose from an unskillful use of a printed blank policy, adopted to an insurance for a particular voyage, and unsuitable to the mode of insurance intended and expressed by these parties. The same unskillfulness led to the insertion of the words upon which this controversy has arisen. When a particular voyage is insured upon a vessel, the place from and the place to which the vessel is bound, are the *termini* of the risk insured; but sometimes the insurance is made to commence at the place of lading, and usually the continuance is restricted to a certain time after the arrival of the vessel at the place of discharge. Where a circumstance in the description of the property or risk insured is in its nature wholly immaterial, the failure of it never operates to defeat the contract: Park, c. 2; Skin. 243. Its operation may be extended or defined by places and circumstances not otherwise essential.

The case may be supposed of an insurance from the port where the voyage commenced, and at and from an intermediate port, where the vessel is at liberty to touch, stay, and trade, and thence to her port of discharge. If, under such an insurance, the intermediate port should be omitted in the course of that voyage, and the vessel should sail by it to her ultimate port of destination without stopping, it never would be insisted on that the voyage insured had not been pursued, and because the vessel had never been, in fact, insured at the intermediate port, that therefore there was no insurance after the arrival and passing by it. Or, to suppose another case, nearer in one respect to the present, that an insurance commences, or the risk undertaken by the insurers begins, at and from an intermediate port, in a voyage understood to have commenced at some other port; and in the course of it the vessel should arrive off or at the port where the risk is described to commence, but proceeds without stopping; would the policy be defeated, because a part of the risk and undertaking by the insurers had never been incurred? So, I apprehend, in the case at bar, the particular intent of insuring at Barbadoes, or of commencing this insurance there, is

not exclusive of any other place; and the commencement of the risk is determined by the day and hour expressed in conformity to the general interest of the parties, which has no reference to the place where the vessel was when the risk commenced; nor in the nature of the contract was that circumstance at all material. When descriptive words include an immaterial circumstance, this is not to be understood, or construed, as a stipulation, or warranty, or condition, rendering the whole contract dependent on that circumstance. Where such stipulation is expressed, it must have its effect; but it is not to be taken by implication or construction against the general import of the contract to be enforced. I have found no judicial decision of any common law court which I can cite as an authority for the decision of this cause, otherwise than in support of the general principles of construction, to which I have endeavored to adhere. I find in the works of a foreign jurist, the learned Bynkershoek, one case stated, and a decision upon it, with his opinion on the question, which has some analogy with the case at bar: Bynk. 427; Quaest. jur. priv., lib. 4, c. 1.

In illustrating the rule everywhere applied to contracts of insurance—that the policy is void if there be not inserted in it the names of the places, from and to which the vessel is bound, as descriptive of the voyage insured, to the end that the commencement and duration of the risk may be precisely known—he states this case to have been decided by the Belgic council. The assured, in a policy made at Amsterdam, upon a vessel bound from Bilboa to Hamburg, had it inserted in the policy, “the insurance to commence from the island of St. Martin’s, the assured having information that the vessel stopped there.” The vessel, having a favorable wind, sailed by the island, and made no stop there, but afterwards was lost at Dunkirk. The insurers in this case were adjudged liable for the risk and loss, and Bynkershoek approves the decision. But he also mentions that the same court made a contrary decision in a similar case, soon afterwards brought before them; requiring then a strict adherence to the words of the policy, and the stopping of the vessel at the place where the insurance was to commence, as a condition, the failure of which prevented the commencement of the insurance.

This last decision, Bynkershoek reprobates in very strong terms. The addition of the assured’s having intelligence that the vessel stopped at St. Martin’s was inserted, he says, for no other cause than as it respected the *termini* of the risk, from

what place it belonged to the insurer; for, as to the vessel's stopping there or not, of what importance was it? And therefore he adds, he should be of a different opinion, if the loss might be attributed to the failure of that circumstance; as in the case of a local restriction, and a duty to be paid at the place where the vessel was to have stopped, and a forfeiture in consequence of her sailing by without stopping.

In the case at bar, judgment is to be rendered for the plaintiff, and therefore, in pursuance of the agreement of the parties, the defendants must be called.

Defendants defaulted.

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### LUDDEN v. LEAVITT.

[9 MASS. 104.]

**RIGHT TO MAINTAIN TROVER.**—A sheriff having attached personal chattels, a person to whom he delivers them for safe keeping, is merely his servant, having no legal interest in the chattels, and cannot therefore maintain trover for them.

**TROVER** for a yoke of oxen and a horse. The property in question was originally the property of the defendant and had been attached by a sheriff at the suit of one Blossom, and delivered by the sheriff to the plaintiff for safe keeping. The transaction occurred in the highway, near defendant's house, where the plaintiff left the cattle, and they continued in the defendant's possession, with the plaintiff's knowledge, for several months, when defendant sold them. Upon the issuance of an execution on the judgment recovered by Blossom, the sheriff demanded the cattle of Ludden, who, not being able to deliver them, paid the amount of the judgment, and then brought this action.

*Greenleaf*, for the plaintiff.

*Dana*, contra.

By Court: It is unnecessary to go into an inquiry whether the juggling between the plaintiff and defendant in the present action gave any equitable claims to one against the other; since there is a general principle, which will decide this action and all others similar to it, of which there are many in various parts of the commonwealth.

it appears, from the agreement of the parties, that the only right acquired by the plaintiff over the property in contest was by delivery of it by the deputy sheriff to him for safe keeping.

This did not constitute him a bailiff of the property, but a mere servant of the sheriff, without any legal interest in the cattle. The sheriff should have brought the action, as the special property unquestionably remained in him, notwithstanding the delivery to the plaintiff. The general property was in the defendant. The plaintiff, therefore, having neither the general nor special property, cannot maintain trover. Whether the circumstances and facts agreed do not give him a right to satisfaction in some other form of action, needs not now be determined.

Plaintiff nonsuited.

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The doctrine of this case is denied in *Poole v. Symonds*, 1 N. H. 289; *Thayer v. Hutchinson*, 13 Vt. 506. The general subject of a right to maintain trover, and the doctrine of these cases is considered in a note to *Hostler v. Skull*, 1 Am. Dec. 583.

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## ALLEN v. HOLDEN.

[9 Mass. 133.]

**ASSIGNMENT OF JUDGMENT TO SHERIFF.**—It is not a good defense to an action on a judgment by the sheriff in the name of the original plaintiff, that the sheriff had been sued for neglecting to serve an execution issued thereon and had paid the amount of the judgment; such payment being by way of damages for the neglect, and not in discharge of the judgment.

**ACTION** of debt in which the plaintiff declared upon a judgment recovered against the defendant. Plea, *nil debet*, with leave to give special matter in evidence. The defendant gave in evidence a return by one Wyman, a deputy sheriff, of no goods, upon an execution issued upon the judgment, and also read an attested copy of a writ sued by Allen against Bridge, the sheriff, for the failure of his deputy to make proper levy of the execution. It was also admitted that during the pendency of the action against Bridge, Wyman made an adjustment with Allen, giving him a note for the amount of the judgment, in consideration of which Allen dismissed his action against the sheriff and assigned to Wyman all his interest in the judgment against Holden, together with authority to Wyman to prosecute an action thereon in his, Allen's, name; whereupon this suit was brought. It further appeared in evidence, that while the execution was in force Holden had given one hundred dollars to one Thompson, who was also indebted to Holden in that sum, which with the hundred dollars was equal to the amount of the judgment; and that Wyman, at Thompson's promising to discharge the judgment, neglected to serve the execution.

A verdict was taken for the defendant subject to the opinion of the court whether the action could be maintained.

*Mellen*, for the plaintiff, contended that the action being for the benefit of Wyman, his interest was one which courts of law would notice and protect: *Wynch v. Keely*, 1 T. R. 619; *Master v. Miller*, 4 T. R. 341.

*Wilde and Orr, contra.* Wyman by his negligence became liable to pay the amount of the judgment, and by reason of such liability he did pay the judgment, which then became vacated. He had become the principal debtor to the judgment-creditor, and was in no better position than a surety, who can not, in that character, maintain an action upon a bond which he has discharged: Com. Dig. Chancery 4, D. 6. Allen having received satisfaction for his debt, had no further demand; he could not then assign to another what he did not himself possess: *Rex v. Sheriff of Middlesex*, 1 H. Bl. 543.

By Court, PARKER, J.: The question in this case is whether the facts reported by the judge who sat in the trial of the action, were legal and sufficient evidence to maintain the issue on the part of the defendant, viz., that he owes nothing, or, in other words, whether they prove payment and satisfaction of the judgment. As it respects the defendant, he has paid nothing, and although the plaintiff has received a sum equal to the amount of his judgment, we do not see how the defendant can avail himself of that sum to discharge him from his liability on the judgment. The suit against the sheriff was not for the debt, but for damages for his non-performance of his duty; and only nominal damages might have been recovered, had it appeared that nothing had been lost by the negligence of the officer. Had that suit, therefore, proceeded to judgment and execution, it would have been no legal discharge of the original debtor from the judgment recovered against him. It is true that the plaintiff may receive his debt twice, if he should recover against the sheriff the full amount of his judgment; but the debtor pays but once, so that he is not injured. Whether an officer, having been sued for his negligent doings on an execution, and having paid the amount of the debt in damages, may not maintain an equitable action against the creditor, provided he afterwards obtains his money from the debtor, is a question between the creditor and the officer, not necessary to be settled here. No authority has been cited, and I believe none can be found, to show that the recovery of damages against a delinquent officer,

by the creditor, operates a discharge of a judgment against the debtor. It is very clear, however, that an officer, under such circumstances, could not maintain an action against the debtor, for he would be obliged to found his claim upon his own failure of duty.

It is stated, in this case, that this suit is brought for the benefit of the officer, the debt having been assigned to him on his compromise of the suit brought against his principal by the creditor. Such an assignment may be perfectly equitable between the officer and the creditor. Many cases exist where a sheriff or his deputy becomes liable through misfortune or accident, rather than from willful neglect of duty; and in such cases there seems to be no good reason why the creditor, who receives prompt satisfaction from the officer, should not aid him in obtaining an indemnity from the debtor, who can have no cause of complaint, since he can in no event be made to pay more than his debt. Indeed, the knowledge that the suit is brought for the purpose of restoring to the officer what he may have lost through carelessness, or, as it often happens, from his humanity towards the debtor, ought not to prejudice the suit. It may be the means of restoring all the parties to their rights without injustice to any one of them. Such an assignment being voluntary, there is no danger of protecting fraudulent or criminal officers from the just effects of their own misconduct.

There are some facts which render the case less favorable to the officer, if he were the party whose rights we could respect in law, than in other cases which may exist. It is stated that the debtor paid a hundred dollars to Thompson, who owed him enough, with that sum, to discharge this execution; and that the officer agreed to look to Thompson, and afterwards, at his request, omitted to serve the execution. This, however, cannot come into consideration, in the present case, between the judgment-creditor and debtor. It is a matter to be settled between the officer and the debtor. It does not, however, appear that the officer had acquired any legal claim upon Thompson, or that he could ever, in any way, compel Thompson to pay. If he could, perhaps the payment to Thompson might be considered as made to the use of the officer, and so ought to be considered as going in satisfaction of the judgment. The defendant has, however, a just and legal claim against Thompson, which he might at any time have enforced; and he may still enforce it, if he has not lost his remedy by negligence.

The effect of this action, therefore, is to restore all things to

their proper place. The debtor, who has paid nothing, is compelled to satisfy a judgment long since obtained against him; the officer will be restored to the money he has paid for the debtor; and the latter may recover of Thompson the money paid to him, and the debt he owes him. There is no legal defense to the action, and no equitable principles to excite a regret that the plaintiff's present claim can be enforced. The verdict must therefore be set aside, and a new trial be granted.

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The payment by the sheriff in this case was in the nature of damages for his neglect and not in discharge of the judgment. In *Norton v. Soule*, 2 Me. 346; Mellen, C. J., delivering the opinion of the court, says, in regard to the principal case: "The court, by considering the sum paid as damages, and looking to the object of Wyman and Allen in that transaction, decided that for the purpose of maintaining the action for the benefit of Wyman, the judgment might be thus viewed as unsatisfied. This seems to be a fair inference from the facts in that case." To show that the judgment is assignable to the sheriff, this case is cited in *Cheever v. Merrick*, 2 N. H. 378; *State Treasurer v. Cross*, 9 Vt. 294; and the sheriff may use the name of the original plaintiff to recover the amount of the judgment: *Robinson v. Schly*, 6 Ga. 523. To the point that the debtor, who had paid nothing on the judgment, could not avail himself of the payment by the sheriff, this case is referred to in *Chester v. Pleistons*, 43 N. H. 545.

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## STINSON v. SUMNER.

[9 Mass. 143.]

**BAR OF DOWER.**—Where a wife releases her claim of dower by joining her husband in a conveyance and the purchaser recovers back the purchase-money on account of the grantor's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after her husband's decease.

**ACTOR for the breach of covenants in a deed.** The case is stated in the opinion.

*Mellen and Coffin*, for the plaintiff.

*Lee and Wilde*, for the defendant.

By Court, PARKER, J. This is an action of covenant broken, upon covenants contained in a deed from the defendant to John Anderson, dated in the year 1801, conveying certain tenements in Wiscasset to the said Anderson, his heirs and assigns. In July, 1802, John Anderson conveyed the same tenements to Francis Anderson, his heirs and assigns; and, in 1803, the said Francis Anderson, by his deed of bargain and sale, duly executed, acknowledged, and recorded, conveyed the same tenements to Stinson, the present plaintiff, who is, therefore,

the assignee of John Anderson, the first grantee, and is entitled to maintain his action upon the covenants, if any of them should be broken. The breach alleged is, that the tenements conveyed were not, at the time of the execution of Sumner's deed to John Anderson, free of all incumbrances, according to one of the covenants in said deed; inasmuch as Elizabeth Parsons, widow of Timothy Parsons, of said Wiscasset, had, at that time, a right of dower in the tenements, and afterwards, viz., in 1807, which was before the commencement of this suit, she had sued out her writ of dower, and by judgment of court had had her dower assigned and set off to her in the premises. There are several pleas by the defendant, and issues thereon, the substance and amount of all of them being, that the said Elizabeth had no lawful right of dower in the premises; and whether the evidence offered and admitted at the trial justified the verdict in favor of the plaintiff, is the principal question referred to the court.

There is a subsidiary question upon one of the issues, in which the inquiry was, whether the present defendant had due notice of Elizabeth Parson's action of dower, so that he was bound by the judgment recovered in that action. But as this question would be material only in case the defendant had now shown that the recovery of dower was wrong, and as the court are of opinion that he has not shown this by the evidence in the case, it is not necessary to consider whether the notice to him precluded him from showing that dower ought not to have been recovered. The title of Sumner to the tenements described in his deed is under the levy of an execution, to satisfy a judgment which he had recovered against Timothy Parsons in July, 1799; the same tenements having been attached on the original writ in that suit in 1796. This levy did not operate to deprive the wife of Parsons of her right of dower; and it would be proper for appraisers, in such cases, in their estimates of the value of land, etc., which they are about to set off to satisfy executions, to deduct the value of the dower; so that, if the land should not be redeemed, the creditor may not suffer by the death of the debtor, and a consequent claim of dower by his widow.

The defendant, however, has attempted to prove that the right of Mrs. Parsons was extinguished before her action for dower, by introducing into the case the deed of Timothy Parsons to David Hinkley, made in 1797, of several parcels of land, including that which is the subject of the present action, in which deed Mrs. Parsons had joined in the usual form, for the purpose of relinquishing her right of dower in all the premises conveyed

by the deed; and has also produced a deed from the said Hinkley to himself, dated in September, 1807, while the action for dower was pending, in which last deed the said Hinkley, for the consideration of ten dollars, grants, conveys, releases, and quitclaims, all his right in the tenements to the said Sumner, his heirs and assigns, forever. If the title to the land described in this deed was, at the time of its execution, in Hinkley, according to the terms of the deed, this would be a sufficient defense to the present action, unless the defendant was bound by the notice before mentioned; because it would show that Mrs. Parsons had parted with her right of dower, in a manner become legal by the long-established usage of this commonwealth; and the right acquired by Sumner, under this deed, would have inured to Stinson, the present plaintiff, to whom Sumner had passed all his right in the premises. The defense is, however, answered by the plaintiff, by showing that, at the time of the execution of the deed from Parsons and his wife to Hinkley, there were subsisting attachments upon it, in the suit of Sumner, and in another of Codman against Parsons; that, in 1798, Hinkley had instituted his action of covenant broken against Parsons, upon the deed aforesaid, alleging those attachments as a breach of the covenants; and that afterwards Hinkley had recovered his damages on account of this circumstance; and it appears that the land now in question was, in fact, taken by Sumner to satisfy the judgment recovered by him, for the security of which the attachment was made. Now, the principle upon which Hinkley's action against Parsons was sustained, and his damages given, must have been, that Parsons had no right to sell and convey the land described in the deed, and it was upon a covenant to that effect that his action was brought. It would certainly be manifestly against the principles of justice, that a grantee should recover either his purchase-money or the value of the land, against the grantor, upon an alleged breach of covenant that nothing passed by the deed; and that he should yet be considered the owner of the land, under the very deed which he had alleged to be inoperative.

It has lately been decided in York, *vide Porter v. Hill*, 9 Mass. 34, [ante, 22] that one who has recovered judgment for damages, for a breach of the covenants in his deed, upon an allegation that the grantor was not seised, and had no right to sell, shall not set up his deed against the grantor, or any one claiming under him, in an action for the land; but that a judgment for the recovery of damages, for the breach of such cov-

tenants, shall avail against such deed, when pleaded by a party having a right to plead such judgment. This case depends upon the same principle. The estate did not pass from Parsons to Hinkley, as appears by his own allegations and proceedings; and the relinquishment of dower by the wife cannot now avail, since there is no estate in Hinkley for it to operate upon. This, probably, was the view of Hinkley himself; otherwise he would not have parted with his supposed right to Sumner for the small consideration of ten dollars. Some objections to the mode of assigning the dower were suggested in the argument; but they cannot avail in the present defense, as the judgment which deprived the plaintiff of so much of his land is now in force; and although it may have been irregular, we are not satisfied that it is erroneous, so that it can be vacated.

Let judgment be entered on the verdict.

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The doctrine of this case is affirmed in *Robinson v. Bates*, 3 Met. 43; and *Walker v. Walker*, 101 Mass. 172. See 2 Scribner on Dower, 295.

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## LINCOLN AND KENNEBECK BANK v. PAGE.

[9 MASS. 165.]

**USAGE OF BANK.**—The well established usages and by-laws of a bank respecting demand and notice, are to be understood as forming a part of the contract with parties who have dealings with the bank.

**ACTION** against the defendant as indorser of a promissory note, payable at the Lincoln and Kennebeck Bank. The only question was as to the demand upon the makers and notice to the defendant. It was in evidence that by the by-laws of the bank, the cashier was required to notify all promisors on notes, one day at least before they became due, of the time of their becoming due. The cashier testified that he had no doubt of his making out the usual notice to the promisors on this note, and that he delivered the same to one Tallman, a resident of the same town with the promisors, although he had no positive recollection of that fact. He further testified that the custom of the bank was to notify indorsers on the day notes became due in case they were not paid or renewed, and that he had no doubt he made out such notices and put that directed to the defendant in the post-office; although of this last fact he had no distinct recollection. Tallman testified that he was at the bank on the day referred to; that he had frequently delivered notices

of the maturity of notes, and that if said notice was delivered to him in this instance he had no doubt but that he delivered it to the promisors or left it at their store, but of this he had no distinct recollection.

The jury were charged that if the cashier was present at the bank at the usual bank hours on the day the note became due, and there was no money paid or deposited in the bank by the promisors, a demand upon them, or any previous notice to them, according to the custom, was not necessary. A verdict being found for the plaintiffs, the defendant excepted.

*Lee*, for the plaintiffs.

*Wilde*, for the defendant.

By Court, SEWALL, J. The usages adopted by individuals concerned in any course of business—for instance, in the negotiation of promissory notes, by which loans are obtained and renewed at banks—become, as to those parties, rules by which their contracts are to be construed; and in any circumstance not ascertained by express stipulation, and especially as to privileges depending on legal implication and construction, and understood to be reserved for the particular benefit of the individual, what is known among the parties to be usual in their course of business, is to be taken as consented to, and to have the same effect as if inserted in their contracts. It is incumbent upon the holder of a negotiable note for money to prove, in maintaining an action against an indorser, a demand upon the promisor as soon as the note became due, and a notice to the indorser, if it then remained unpaid. The indorser is liable after due diligence employed to obtain payment of the maker, and upon notice that payment has not been made; and this being understood as the condition of the contract implied in his indorsement, he is not liable until these circumstances are substantially proved. But, as privileges reserved and implied for his special benefit, he may waive or modify them. When this is done by an express stipulation, there can be no doubt; and when he continues to indorse notes, and to deal with a bank, where, by known usage or the by-laws of the bank, these privileges have been taken to be waived or modified, his dealings and contracts are to be understood and enforced with the constructive effect of such usage or by-laws.

In the case at bar, there is not only evidence of a known usage, from which a consent may be implied, but also of an express agreement, on the part of the customers of the bank—

those who dealt with the plaintiffs in this action, as the defendant did—in drawing, indorsing and negotiating notes for discount, and in the renewal of notes discounted, as to the notice to drawers and indorsers, the mode of giving it and the effect. And, according to this consent, when the defendant is charged as an indorser of a negotiable note, a demand upon the promisor, the day before the note became due, is to be considered as the diligence required of the bank; and notice to the indorser, on the day when the note was payable, is seasonable; and letters from the bank, containing a demand or notice of this kind, left at the post-office in Wiscasset, are equivalent to an actual demand and notice. We do not perceive that the title of the plaintiffs to recover depends on the facts that the cashier had been present at the bank during the usual bank hours on the day when the note in question became due, and that no money had been then paid or deposited by the promisors in the note.

The general rule of law requires a demand and notice to charge an indorser. This had not been altogether dispensed with by any usage or stipulation, but modified as to the time and manner; and whether a demand and notice were proved or are provable, according to the fair expectations of the parties concerned and considering the confidence specially reposed in the directors of the bank, belonging to the same town, are questions for the jury to determine. Their verdict may be and probably will be the same, upon the evidence stated, as it now is; but the verdict found was not directed by those principles which are to be observed in cases of this kind. It is therefore to be set aside, and a new trial granted.

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In 1 Daniel on Negotiable Instruments, sec. 658, it is stated, noticing this case, that “in some of the states it has become customary for banks of a particular place, which are the holders of negotiable paper, to issue a notice to the promisor a few days before maturity informing him that the paper is in the bank, setting forth the date when it will become payable, and requesting him to come there and pay it; such notice constituting a conventional demand, and a neglect to comply with it is such a refusal as amounts to dishonor of the paper. The custom prevails where the paper is payable at the bank giving the notice.” See Proffatt on Notaries, sec. 102.

## CROSSEN v. HUTCHINSON.

[9 Mass. 205.]

**INSOLVENCY AFFECTING DEMAND.**—A demand by the holder upon the maker of a promissory note, and notice to the indorser, are not excused in a case where the promisor becomes insolvent after the assignment, and continues so until and at the time the note falls due.

Writ of error to reverse a judgment, in an action of assumpsit brought by Hutchinson, as indorsee, against Crossen, the indorser of a promissory note. The first count alleged a demand upon the maker, non-payment and notice. The second count averred that at the time of the indorsement and ever after, the promisor was insolvent and unable to pay the amount of the note, of all which the indorser was aware. It appeared on the trial that Ruggles, the promisor, was insolvent at the time of making the note, and was generally reputed to be without property; that he left the commonwealth five days after the note fell due; and that on the following day notice of non-payment was given to the defendant. On the part of the defendant it was proved that the maker, indorser and indorsee, all lived in the same town; that the maker was not concealed, but was residing openly therein until the day of his departure after the maturity of the note; and that, on that day, he caused several demands against him, including the note in question, to be secured by notes of his brother.

A verdict was found for the plaintiff, pursuant to instructions of the court, which appear from the opinion; whereupon this writ was taken.

*Dewey*, for the plaintiff in error, cited *Nicholson v. Gouthit*, 2 H. Bl. 609; 2 Will. Ab. 429; Chitty on Bills, 88; *May v. Coffin*, 4 Mass. 341.

*Sedgwick, contra*, cited *De Berdt v. Atkinson*, 2 H. Bl. 336; *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206]; *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47].

By Court, SEDGWICK, J.: By the bill of exceptions in this case, it appears that the plaintiff below, to rebut the charge of laches, insisted that it was not incumbent on him, either to demand payment of the maker of the note, or to give notice of non-payment to the indorser, if the jury should be satisfied that the maker of the note was notoriously insolvent, as well at the time of the assignment of the note, as at the time it fell due. This was the question raised by the counsel, and which should have

been resolved by the court. But instead of instructing the jury upon that question, the direction of the court was, "that if the jury should be fully satisfied by the evidence that Ruggles," the maker of the note, "at the time when the note fell due, was insolvent, and that no estate of his could then be found to be attached, in such case it was not necessary for the plaintiff to prove a demand on the promisor, nor notice to the defendant, the indorser, before the commencement of the suit; and that if the evidence satisfied the jury of the insolvency of Ruggles, when the note became due, they would find a verdict for the plaintiff."

Now, we are all clearly of opinion that this direction of the court below was incorrect; for, however reasonable it may be thought, that if one assigns a note of a man living in his neighborhood, notoriously insolvent at the time, and who continues so until and at the time it falls due, that he should not throw the loss of it on the assignee, because he fails to make a demand of payment of the promisor, which would probably be wholly unavailing; or because he fails to give notice to the assignor, which, if given, could be of no benefit to him; yet it cannot be reasonable to dispense with such demand and notice, in a case where the promisor becomes insolvent after the assignment, and continues so until and at the time it falls due; and more especially where, as in the case before us, if notice were seasonably given, the assignor might have arrested the body of the promisor; the opportunity for doing which was lost by the neglect of giving notice; and where, not long before, he had satisfied demands against him to a much larger amount than that in question.

We are all of opinion that the direction of the court below was erroneous. It follows that there must be a new trial; and let it be had at the bar of this court.

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See *Bond v. Furnham*, 4 Am. Dec. 47, and note thereto, where this subject is examined.

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## CATLIN v. WARE.

[9 MASS. 218.]

**DEED ENTITLED TO RECORD.**—Where a deed is executed by a husband and wife, an acknowledgment by the husband is sufficient to entitle it to be recorded.

**EXECUTION BY WIFE.**—Where, in a conveyance by a husband, the signature and seal of the wife are affixed, but her name not being otherwise men-

tioned in the deed, it was held that she did not thereby bar her right of dower.

**DOWER IN IMPROVEMENTS.**—A widow should recover her dower in the tenements as they were at the time of alienation by the husband. But as against the heir she should have dower in improvements made by him after descent cast.

**WARR of dower.** Defendant pleaded, 1. That the demandant husband, Joseph Catlin, was never seised; and, 2. That being seised he conveyed the same for a valuable consideration to one Horton, and that the demandant for the consideration expressed in the deed and one dollar additional, agreed to the deed and affixed her signature and seal thereto, thereby barring her right to dower. Upon the trial the deed was produced, but the demandant's name appeared only after the signature of her husband, and nowhere in the deed were there any words purporting or implying a release of her dower. The deed was acknowledged by the husband and recorded, but there was no acknowledgment by the wife. The jury were directed to find for the defendant subject to the opinion of this court upon the effect of the deed and upon the question respecting dower in the improvements on the land.

*Bliss*, for the defendant, cited *Fowler v. Shearer*, 7 Mass. 20; and *Pidge v. Tyler*, 4 Id. 541.

*Ashmun, contra.*

**By Court.** Two objections, made to the deed read in evidence at the trial of this cause, have been replied to by the counsel for the tenant.

As to the second—the want of an acknowledgment by the wife—we think an acknowledgment unnecessary in the case. One party to a deed acknowledging it gives notoriety to it, and that is the whole that is necessary. Though a deed be acknowledged and recovered, yet, on the issue of *non est factum*, the execution of the deed is still to be proved, as if it had not been acknowledged. Neither was an acknowledgment by the wife necessary in order to make the deed binding on her. She must know her own acts, and is bound by such, as the law authorizes her to execute.

The other objection to this deed has much more weight in it, and is indeed fatal to the defense of the action. A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing

the deed, there are no words implying her intention to release her claim of dower in the lands conveyed, which must have been, to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower.

As to the question referred to us respecting the increased value of the lands, in which the demandant claims her dower, as they have arisen from the labors and expense of the purchaser, it is our opinion that she is entitled to her third part of the land, in the condition it was in at the time of the alienation by her husband. Had the heir of the husband been the tenant, and the improvements been made by him after the land descended, it would have been otherwise; for it was his folly not to assign the dower to the widow, before he made the improvements.

Judgment on the verdict.

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As to the effect of the mere signature of the wife, this case is frequently cited in Massachusetts. In *Greenough v. Turner*, 11 Gray, 334, referring to the principal case, the court say: "That to bar her dower, she must not only join with her husband in a deed of conveyance, by executing the deed, but the deed so executed must contain apt words of grant or release by her, \* \* the court could not inquire into her intention in joining in the deed with her husband, if that intention was not manifested by the deed itself." So, in *Wildes v. Van Voorhis*, 15 Gray, 144; *Hubbard v. Knous*, 3 Id. 568; *Harper v. Gilbert*, 5 Cush. 418; *Leavitt v. Lamprey*, 13 Pick. 383. As to dower in improvements made by the heir, the case is cited in *Parker v. Parker*, 17 Pick. 240; and as to the sufficiency of the acknowledgment by one of the grantors, in *Perkins v. Richardson*, 11 Allen, 540. The case is further cited in *White v. Graves*, 107 Mass. 328, upon the wife's power to bar her right to dower by deed. As to dower in improvements, see *Van Doren v. Van Doren*, 4 Am. Dec. 408.

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## DICKINSON v. BARBER.

[9 MASS. 225.]

**EVIDENCE OF INSANITY IN SLANDER.**—Where a defense of insanity is set up in slander, evidence is admissible, showing insanity at the time of speaking, and for several months before and after, but no farther.

**OPINIONS OF PHYSICIANS.**—The opinions of physicians concerning such insanity, but stating no facts on which such opinions are based, are not admissible in evidence.

**SLANDER.** Defendant had said, at divers times, that the plaintiff had been criminally intimate with defendant's wife. The defense was the insanity of the defendant, and evidence having been given by the latter's guardian tending to show such insanity before and at the various times of speaking the words, evidence

was offered that ever since those times the defendant had been and still was delirious and insane. The judge refused to admit testimony to show insanity since the Summer succeeding the slanderous utterances, which were made in March, and also rejected the depositions of two physicians which set out that, in their opinion, the defendant had been insane since the time of speaking the words. Upon the verdict being for the plaintiff the defendant excepted.

*Newcomb*, for the plaintiff.

*Bliss and Ashmun*, contra.

The Court observed that the exceptions were to two decisions of the judge who presided in the trial of this cause. The first was, that he rejected evidence which would have gone to show symptoms of insanity after the summer which succeeded the speaking the words charged. In this they held the conduct of the judge to be correct. Facts arising so long after could have little or no tendency to show the actual state of the defendant's mind at the time he spoke the words; while they might, nevertheless, produce an improper effect on the minds of jurors.

The rejection of the depositions was also confirmed by the court. The deponents state no facts on which they ground their opinion. This is to be required from physicians as well as others. Juries are to judge of facts; and although the opinions of professional gentlemen on facts submitted to them have justly great weight attached to them, yet they are not to be received as evidence, unless predicated upon facts testified either by them or by others.

The court observed that they gave no opinion in this case how far, or to what degree, insanity was to be received as an excuse in an action for defamatory words. Where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight or not uniform, the slander might have its effect; and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly.

Judgment on the verdict.

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The doctrine established in this case, and in *Hathorn v. King*, 5 Am. Dec. 106, regarding the opinions of experts, is not in harmony with the general current of authorities at the present time. The doctrine is very thoroughly examined in late cases in New Hampshire with remarkable research and ability, especially in a dissenting opinion of Doe, J., in *State v. Pike*, 49 N. H.

421, and by Foster, J., giving the opinion of the court in *Hardy v. Merrill*, 58 N. H. 227: See note to *State v. Pike*, 11 Am. L. Reg. 259.

The case of *Hardy v. Merrill* will undoubtedly be one of our leading cases on this subject, as here the principles governing the cases were ably examined, and previous cases carefully considered. It was now determined that non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator when founded upon their knowledge and observation of the testator's appearance and conduct. And in this respect the cases of *Boardman v. Boardman*, 47 N. H. 12; *State v. Pike*, 49 Id. 468, were overruled. The opinion in this case notices as peculiar the doctrine prevailing, or rather which has prevailed in Massachusetts. Foster, J., says: "It is proper for me to invite attention to the history of what I have called the Massachusetts exception. Beginning with *Poole v. Richardson*, 3 Mass. (A. D. 1807), we find no very wide departure from the general rule of admissibility. The case holds that non-professional witnesses may 'not testify merely their opinion or judgment.' Judge Doe (*State v. Pike*, 410), suspects that 'the only point ruled in this case was, that the witnesses were allowed to give their opinions when they stated particular facts from which the state of the testator's mind was inferred by them.' But the exception grew and dilated, finding larger and stronger expression along through the years, and the course of the cases of *Hathorn v. King*, 8 Mass. 371; *Dickinson v. Barber*, 9 Id. 225; *Needham v. Ide*, 5 Pick. 510; *Commonwealth v. Wilson*, 1 Gray, 337, down to *Commonwealth v. Fairbanks*, 2 Allen, 511 (A. D. 1861), when it was held *per curiam* 'that the incompetency of the opinions of non-experts was not an open question in Massachusetts;' though Judge Thomas had recently said, in *Baxter v. Abbott*, 7 Gray, 79, that 'if it were a new question, he should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence and his means of observation.'

"In very recent times, however, we observe a more liberal disposition on the part of the Massachusetts courts: See *Barker v. Comins*, 110 Mass. 477 (A. D. 1872), and *Nash v. Hunt*, 116 Mass. 237 (A. D. 1874.) In the former of these cases it was held that persons acquainted with the testator, although neither witnesses to the will, nor medical experts, may testify whether they noticed any change in his intelligence, and any want of coherence in his remarks. Gray, J., said: 'The question did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion but of fact, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred.' In *Nash v. Hunt*, a witness was allowed to say he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition, Judge Wells saying: 'We do not understand this to be giving an opinion as to the condition of the mind itself, but only of its manifestation in conversation with the witness.' The witness could state, 'as matter of observation, whether his conversation and demeanor were in the usual and natural manner of the testator or otherwise;' and in *Commonwealth v. Pomeroy*, 117 Mass. 149, non-professional witnesses were allowed to state without objection that the prisoner, in conversation and manner, evinced no remorse or sense of guilt. With deference and great respect I may be allowed to say, that I rejoice much more in the results attained in these latter cases than in the *modus*

opinions of judicial reasoning by which the conclusions were reached. They indicate decided and accelerating progress of the Massachusetts courts in the right direction. The full establishment of the true doctrine there, is a question of time only."

An elaborate examination of the authorities is made by Doe, J., in his dissenting opinion in *State v. Pike*, and he shows that in this country the authorities are almost unanimous in favor of the competency of the evidence; and only in Maine, Massachusetts and Texas are there authorities against it. Speaking of the decisions in Maine, he says: "The counties of Massachusetts which became the state of Maine thirteen years after the exception was introduced in *Poole v. Richardson*, did not abandon their practice on that point, as they did not abandon the general system of practice which had grown up with them while they were a part of Massachusetts. For thirteen years the exception had the same authority, and was administered by the same court in Essex and in York. As it was never examined in Massachusetts on the south, so it has never been examined in Massachusetts on the east: *Ware v. Ware*, 8 Greenlf. 42; *Wyman v. Gould*, 47 Me. 159. It is equally regarded in both as an inherited peculiarity for which no one is responsible. Its position as an authority was not materially strengthened by the division of the state. In *Gehrke v. State*, 13 Tex. 568, it was summarily held, without any citation of authority or consideration of principle, that it would have been improper to receive as evidence the vague, indefinite expression of a witness that the prisoner looked like or acted as an insane person."

In the late edition of Redfield on Wills, referring to *Hardy v. Merrill*, the author says: "There will now remain scarcely any dissentients among the older states; and those of recent origin, whose decisions have been based upon the authority of the earlier decisions of some of the older states, which have since abandoned the ground, may also be expected to change."

The position of the New York courts on this head is well stated in *Hewlett v. Wood*, 55 N. Y. 634. The general rule, it is there stated, is that witnesses must speak of facts alone, and may not utter opinions, conclusions or inferences. To this rule there are these exceptions: The subscribing witness to a will may speak as to the sanity of the testator at the time of executing a will: *Powell on Dev.* 69; *Clapp v. Fullerton*, 34 N. Y. 190. Experts may give their opinions upon questions of trade, skill or science from the facts proven, or the circumstances noted by themselves. Persons not experts may testify to facts and incidents, known or observed by them, in relation to a testator, which tend to show soundness of mind or the contrary, and may testify to the impression produced upon them by what they beheld or heard or whether the acts and declarations thus testified to seemed to them rational or irrational: *Clapp v. Fullerton*; but they may not express an opinion as to the general soundness or unsoundness of mind of the testator: *People v. O'Brien*, 36 N. Y. 276; *People v. Reel*, 42 Id. 270; nor as to the competency of the testator to execute a will: 36 N. Y. 276; *De Witt v. Barley*, 17 Id. 340.

In *Pidcock v. Potter*, 68 Pa. St. 342, the doctrine now adopted in Pennsylvania is stated. There it is held that medical men, as experts, may give their opinion upon hypothetical cases or upon facts proved. Subscribing witnesses may testify as to the state of the decedent's mind, and in addition to facts may give their opinion. After a non-professional witness has stated the facts on which his opinion is founded, he may state his opinion as to the sanity of the testator. This is substantially the doctrine adopted in New Hampshire as laid down in *Hardy v. Merrill*. See Wharton on Evidence, sec. 512.

## FOWLER v. BEBEE.

[9 MASS. 231.]

OFFICERS DE FACTO RECOGNIZED.—In an action between other parties, the court will not decide whether a person claiming to be sheriff of a county, and actually discharging the duties of the office, be sheriff *de jure*.

DEMURRER to plea in abatement. The original writ was served by one Rodney Day, as a deputy under Smith, sheriff of Hampden county. After oyer of the writ and return, the defendants pleaded in abatement that Smith was not the lawful sheriff of that county, although exercising the office thereof; and set out certain facts tending to show the usurpation by him.

Demurrer and joinder.

*Lathrop*, in support of the demurrer.

*Bliss, contra.*

By Court, PARSONS, C. J.: The question which, by the plea before us, we are called on to decide in this action, is, whether the service of the original writ by Rodney Day was legal.

That Jonathan Smith, jun., is sheriff of the county of Hampden *de facto*, is very certain; but whether he is sheriff *de jure*, is the question made by the defendants.

Mr. Smith is no party to this record, nor can he be legally heard in the discussion of this plea; although our decision would as effectually decide on his title to the office as if he were a party. This would be judging a man unheard, contrary to natural equity and the policy of the law. From considerations like these has arisen the distinction between the holding of an office *de facto* and *de jure*.

We do not decide whether he is sheriff *de jure* of the county of Hampden, or has intruded himself into the office. But as we are of opinion that he is sheriff in fact of that county, the plea in abatement must be adjudged bad, and the defendants ordered to answer further.

If an action should be commenced against one claiming to be sheriff, for an act which he does not justify, but as sheriff; or if an information should be filed, calling on such a one to show cause why he claimed to hold that office; in either case he would be a party; and the legality of his commission might come in question, and meet a regular decision.

*Respondeas ouster* awarded.

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This case is cited and approved in *Commonwealth v. Hawkes*, 123 Mass. 529, and *Sheehan's case*, 122 Id. 446.

## MOWER v. INHABITANTS OF LEICESTER.

[9 MASS. 247.]

**LIABILITY OF TOWN.**—No action lies at common law against a town for damages occasioned by defective highways.

ACTION on the case for the loss of plaintiff's horse caused by defendant's neglect to keep in repair a certain bridge. Upon a verdict for the plaintiff for the value of the horse, the defendants moved in arrest of judgment.

*Bigelow*, for the defendants, contended that the action would not lie at common law, and cited *Russell v. Men of Devon*, 2 T. R. 667; *Riddle v. The Proprietors, etc.*, 7 Mass. 169 [5 Am. Dec. 35.]

*Blake and Lincoln, contra*, urged that towns are, by statute, bound to maintain in good repair all highways: 1786, c. 81, sec. 1; that for a special injury to an individual for a neglect of this duty the town is liable in double the damages sustained: *Id.* 7; and that an action for the recovery of single damages only would lie at common law: *Lobdell v. New Bedford*, 1 Mass. 154.

By COURT. The plaintiff has brought his action against the inhabitants of the town of Leicester, for the loss of his horse, occasioned by the neglect of that town to keep a certain bridge in repair. The action is at common law, without alleging any notice to the inhabitants of the defect in the bridge, previously to the incurring of the damage by the plaintiff. But it is well settled that the common law gives no such action. Corporations created for their own benefit stand on the same ground, in this respect, as individuals. But quasi corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the neglect of duties enjoined on them; but are not liable to an action for such neglect, unless the action be given by some statute. The only action furnished by statute, in this case, is for double damages after notice, etc. This question is fully discussed in the case of *Russell v. The Men of Devon*, cited at the bar, and the reasoning there is conclusive against the action.

Judgment arrested.

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The question of a corporation's liability is considered in a note to *Riddle v. Proprietors*, 5 Am. Dec. 35.

## KNAP v. SPRAGUE.

[9 Mass. 258.]

**ATTACHMENT, WHEN BINDING.**—The return of a second attachment by a sheriff upon property which he had previously attached, in an action between the same parties, is not binding, unless the property is in the actual or constructive possession of the sheriff.

**ASSUMPSIT** to recover the value of a pair of oxen and a wagon. It appeared that the plaintiff had attached the property in question by virtue of a writ placed in his hands as sheriff, and had delivered them to the defendant, who gave her receipt therefor, promising to deliver them when the plaintiff called for them. Judgment was recovered in the action in which the goods were attached, but no demand upon defendant within thirty days after the rendition of the judgment, was proved. It also appeared that in another action between the same parties to the last action, the plaintiff levied an attachment upon the oxen and wagon, merely by indorsing the attachment on the same articles upon the writ, he conceiving that they remained in his possession by reason of the prior attachment and receipt. Before judgment in this last action plaintiff demanded the property, but defendant had redelivered the same to the original owner as soon as they had come into her possession. It was not shown that defendant knew of the second attachment. A verdict was taken for the plaintiff, subject to the opinion of this court.

*Bigelow and Howe*, for the defendant.

*Blake and Adams*, contra.

The Court observed that the facts presented a novel question. But it was very clear that after the plaintiff had delivered the chattels he had attached to the defendant, taking her receipt and engagement to be responsible for them upon his demand, they could no longer be considered as in the constructive possession of the plaintiff as constable. The second attachment was therefore void, since neither the officer nor his servant had, at that time, the possession of the chattels supposed to be attached. There is no doubt that an officer, having attached goods and chattels, or other estate, by virtue of one original writ, may return a second attachment of the same property, so long as he has either the actual or constructive possession thereof, upon another original writ, whether at the suit of the same plaintiff or of another. But here the goods were wholly out of the offi-

cer's possession, and in the possession of the debtor, when the second writ came to his hands. Upon the facts reported, it is our opinion that the verdict be set aside, and that a general verdict be entered for the defendant, and that judgment be rendered accordingly.

## WORCESTER BANK v. REED.

[9 Mass. 287.]

**BOND FOR FAITHFUL PERFORMANCE—CONSTRUCTION.**—Where the condition of a bond was, that one appointed to an office in a bank should well and faithfully perform all his duties, truly account for moneys intrusted to his care, and continue in said service for the term of two years, unless sooner discharged; it was held that the clause respecting the two years operated only to prevent the officer from quitting the service within two years, and that the condition of the bond protected the bank so long as he continued to serve under the appointment.

**DEBT** on a bond, the condition of which was in these words: "The condition of this obligation is such that whereas Joseph Dodds, of, etc., hath been appointed, by the president and directors of the Worcester Bank, accountant in said bank; now, if the said Joseph Dodds shall well and faithfully perform all those duties and services in the said bank which from time to time shall be required of him by the president and directors of said bank for the time being, and shall truly and faithfully account for all moneys which may be intrusted to his care, and shall also continue in said service for the term of two years, unless sooner discharged, then the above-written obligation to be void; otherwise to remain in full force and virtue." Plea, that Dodds did faithfully perform, etc., for the term of two years, and did truly and faithfully account for all moneys intrusted to his care, for the term of two years, according to the form and effect of the condition.

Demurrer and joinder.

*Bigelow and Lincoln*, for the plaintiffs.

*Blake and Mills*, *contra*, contended that the engagement of the defendants was for the faithful performance of certain duties by Dodds for the space of two years only: *Butler v. Wigge*, 1 Saund. 66; *Wright v. Russell*, 3 Wils. 530; *Arlington v. Merricke*, 2 Saund. 412; *Barker v. Parker*, 1 T. R. 287.

The Court expressed their opinion that the condition of the bond protected the plaintiffs so long as Dodds should continue

to serve them under that appointment: and that the clause respecting his continuance for two years in the service of the plaintiffs was independent of the other parts of the condition, and that its effect was only to prevent his quitting the service before the expiration of that period.

Defendant's plea bad.

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## FREEMAN v. OTIS.

[9 Mass. 372.]

**LIABILITY OF PUBLIC AGENT.**—A public agent is not personally liable on a contract made in the name and on behalf of the government; but if he denies to the government that such contract has been made, and thereby deprives the party of his remedy against the government, the agent is personally liable, as he has disavowed his character of public agent. And if the agent has received from the government money for the satisfaction of the contract, and has not so applied it, he is liable in an action for money had and received.

**ASSUMPSIT.** The declaration contained counts, on an *indebitatus assumpsit* according to a certain account, on a *quantum valebant*, for money laid out and expended, and for money had and received. It appeared in evidence under the general issue that the defendant, an acting collector of customs for the United States, entered into a contract with the plaintiff to charter the latter's vessel as a revenue cutter and agreed to pay therefor a certain monthly sum in addition to the regular wages paid to masters and crews of revenue cutters, the plaintiff being engaged to act as master and to retain the crew he then had on the vessel. The plaintiff performed his portion of the engagement for one month and six days, when defendant discharged the vessel from service and notified the master and crew that they were no longer in the employ of the United States. The defendant agreed to pay the plaintiff's demand, when he had money in his hands; but although much more than this demand had been sent to the defendant by the comptroller of the treasury for the purpose of paying the revenue cutters, defendant failed to pay plaintiff's demand, and this, notwithstanding he had received a letter from the comptroller advising payment, in order to avoid a law suit. There was in evidence a letter of later date from the comptroller to the plaintiff disallowing his claim against the United States, owing to representations by the defendant that plaintiff had been paid for his services. There were also produced, letters from the defendant to the comptroller in which it was stated that the supposed hiring, etc., for

which payment was demanded was merely a proposal on the part of the defendant and not a conclusive engagement or contract. The proposal or contract was made in pursuance of an act of congress authorizing the hiring of revenue cutters.

The jury were charged that if a contract had been made out, with the defendant as agent of the United States, he would not be personally liable, unless by his interference he prevented the allowance and payment of the plaintiff's just demands. The jury found for the plaintiff on the last count, subject to the opinion of this court, upon a motion for a new trial.

*Dana*, in support of the motion.

*Sproat*, *contra*.

The Court said, that where a public agent makes a contract in the name and behalf of the government, it is a point well settled, that the agent is not liable to the action of the party contracted with, who must look to the government. But if such agent should deny to the government that he had entered into such contract, and by such interference prevent the party from his remedy as against the government, he must be personally liable, as he has, by his conduct, in effect disavowed his acting in character of a public agent. On this ground we are of opinion that the verdict is right. Further, if the jury believed that the defendant had received from the treasury the money which was intended to meet the plaintiff's demand, and had refused to pay it over, they were correct in charging the defendant on the plaintiff's count for money had and received.

Let judgment be entered upon the verdict.

See *Brown v. Austin*, 2 Am. Dec. 11, for a similar decision.

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## HATCH v. HATCH.

[9 MASS. 307.]

**DELIVERY OF DEED.**—Where a deed is executed and acknowledged without the knowledge of the grantee, and delivered to a third person to be delivered over to the grantee on the grantor's death, it was held that the deed was effectually delivered at the time of the first delivery, for the use and benefit of the grantee, he having received the deed and claimed the premises under it after the grantor's death.

**ALTERATION OF DEED.**—Rules as to the alteration of written executory contracts are not applied with the same strictness to conveyances of real estate which has vested in possession.

PETITION for partition of certain lands of which the respondents claimed to be sole seized. The case appears from the opinion. A verdict was taken for the respondents subject to the opinion of this court.

*Whitman*, for the petitioners.

*Thomas*, for the respondents.

By Court, SEWALL, J. The petitioners and the respondents are heirs at law of Israel Hatch, deceased, who had been the owner of, and until the time of his death occupied the premises of which partition is prayed. If the premises descended to his heirs at law, the shares of the petitioners are correctly stated in their petition. But the descent is controverted by the respondents, who plead a sole seisin, and for an exclusive title in themselves, they rely upon two deeds produced at the trial, where the questions which have been argued were reserved. It seems to have been a question at the trial, although it has not been insisted on in the argument by the petitioners' counsel, whether these supposed deeds are to be allowed to have any operation or effect, considering the manner of their delivery, and the situation in which they were retained during the life of the grantor therein named, the common ancestor of the petitioners and the respondents. Upon this point, the circumstances in evidence are, that Israel Hatch, about four years before his death, signed, sealed and acknowledged the writings which were produced at the trial as deeds, and which purport to be witnessed as deeds delivered. The grantees named therein respectively are Joel Hatch, one of the respondents in one of them, and in the other Amos Hatch, since deceased, whose heir at law is the other respondent. The two writings, if they operated as grants and conveyances, comprise the whole premises in controversy, which were thereby given, granted and conveyed in part to Joel Hatch and his heirs and assigns, and in part to Amos Hatch, and his heirs and assigns. There is no evidence of the privity or consent of either Joel or Amos in this transaction; but it is proved that the grantor deposited these writings, together with his last will, in the custody of John Turner, esq., to be kept until the grantor's death, and then to be delivered over to the respective grantees. And it is in evidence that they received the deeds after the death of their father.

There is certainly a want of technical skill and accuracy discovered in the mode adopted to express and effectuate the inten-

tions of Israel Hatch, the ancestor, if these were to retain to himself, during his life, the use and occupation of the premises conveyed to Joel and Amos, and for the writings to take effect, consistently with that purpose, after the death of the grantor, and then to operate beneficially to the grantees, in exclusion of the other co-heirs. The grantor was competent to this disposal of his property, and his intentions were in every respect lawful. The doubt seems to be as to the form of conveyance, and we see very little ground for this. The delivery is an essential requisite to a deed, and the effect of it is to be from the time when it is delivered as a deed. But it is not essential to the valid delivery of a deed that the grantee be present, and that it be made to or accepted by him personally at the time: Co. Lit. 36, note 223, Day's edition. A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision which have been resorted to, for the purpose of effectuating the intentions of the grantor or obligor in some cases of necessity. If delivered as an escrow, and not in name, as a deed, it will nevertheless be regarded and construed as a deed from the first delivery as soon as the event happens, or the condition is performed, upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intentions of the parties. This subject was very fully examined in the case of *Wheelwright v. Wheelwright*, 2 Mass. 447 [3 Am. Dec. 66], and the reasoning of the chief justice in stating the opinion of the court in that decision, establishes a rule for deciding the case at bar. The writings deposited with Mr. Turner by Israel Hatch, the ancestor, whether as deeds or escrows at that time, are to be considered as then effectually delivered to the use and benefit of the grantees named therein; they, Amos, as well as Joel, having received them, and claimed under them the premises in controversy, after the death of the grantor.

The objection principally insisted on for the petitioners respects one of these deeds only: that under which the heir of Amos claims the part of the premises in controversy described in the deed to him. It is argued that this deed was destroyed after the death of the grantor, and after the delivery of the deed to Amos, or at that time by an alteration made in it, which he

suggested, and which Mr. Turner made. The alteration was to correct that deed in the descriptive part of the premises conveyed, where one Lapham is mentioned as an owner of adjoining land. In the deed he was called Joshua, which word, at the suggestion of the grantee, was altered to Joseph, that being the Christian name of the Lapham intended in that reference. In the ancient books there are many *dicta* respecting deeds, which in modern cases and decisions have been either neglected or exploded, or so explained as to be rendered consistent with the security of titles and demands depending upon written evidence, and subject at all times to a variety of accidents and misfortunes. The learning upon this subject is revised at large in the case of *Reed v. Brookman*, 3 T. R. 151, where, to excuse himself from a profert of his deed, the party alleges the loss of it by time and accident. And this may be compared with the case of *Master v. Miller*, 4 T. R. 322, cited in the argument, where a material alteration in the tenor of a bill of exchange was considered, by a majority of the court of king's bench fatal to the instrument. In executory contracts provable by written instruments, the remedy is sometimes lost by the loss of the evidence; and bonds and notes which have been altered in a material part by the obligee or payee are no longer proof of an obligation or promise which when given by the party charged, was expressed in other words than the instrument adduced against him. This rule might possibly, though I doubt it, be extended in strictness, even at the present day, to alterations, wholly immaterial, if made at the instigation of the party entitled by the instrument, although it were done innocently, and to no injurious purpose.

But these rules have not the same operation where a title in real estate is in question. The canceling of a deed will not divest property which has once vested by a transmutation of possession. A man's title to his estate is not destroyed by the destruction of his deeds: 2 H. Bl. 259; 10 Co. 92. The deed in the case at bar is evidence competent for the examination and consideration of the jury. Its credit might be impaired in some particular circumstances, while it continued to be not only competent, but satisfactory evidence on the question on trial. In very ancient times, Lord Coke observes, judges did judge, upon their view, deeds to be void, if razed or interlined in material points or places; but of late times the judges have left that to be tried at the bar: Co. Lit. 225, b. The alteration objected to

in the case at bar, however made, is so wholly immaterial, as in no respect to abate the credit which the deed in question would otherwise deserve, and its competency to prove a title in Amos Hatch, which descended to his son, the respondent, remains.

Judgment is to be entered for the respondents on the verdict.

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## WHITE v. HOWLAND.

[9 MASS. 314.]

**SPECIAL INDORSEMENT—EFFECT OF.**—An indorsement of even date on the back of a negotiable promissory note, in the words: "For value received, we, jointly and severally, undertake to pay the money within mentioned to the said" payee, renders the indorsers severally liable as original promisors.

**CASE** on a note made by Taber, and payable to White on demand. Upon the note was an indorsement of even date, as follows: "For value received, we jointly and severally undertake to pay the money within mentioned to the said William White, John Coggeshall, jun., John H. Howland." The declaration contained, among other counts, one as upon a promissory note, signed by the defendant alone. It appeared that for money loaned to Taber by White, Taber agreed to give a promissory note, with two indorsers; and that in pursuance of this agreement, he drew the note in question payable to White, instead of to Coggeshall, as was intended. Howland at first objected to indorsing the note, saying that it was not in the ordinary form of indorsed notes, but finally did sign it.

*B. Whitman*, for the defendant, urged that he was but an indorser, and as no notice of non-payment had been given him, he was not liable.

*Sproat, contra.*

**By Court:** It is very probable that the parties to this note contemplated that the note should have been made, as the defendant's counsel had suggested. But the case finds that this defendant knew before he put his name upon it that it was not so made; and he objected to signing it for that reason. From this it should seem that he was aware that the contract was not so favorable to him as if he had merely indorsed a note in the usual mode. The defendant's counsel objects that there is no count in the declaration to which the note in evidence can apply. But we are all satisfied that this case is within the rea-

son of *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68], and that the effect of the defendant's signature is the same as if he had subscribed the note on the face of it as a surety. He is then answerable, as an original promisor, equally with Taber; and the count in the declaration, which charges him as a several original promisor, is supported by the note in its actual form.

As to the liability of a third person, who indorses a negotiable promissory note before the payee and before the instrument is delivered, see the note to *Fitzhugh v. Love*, 3 Am. Dec. 571.

## DAWES v. BOYLSTON.

[9 MASS. 337.]

### ANCILLARY ADMINISTRATION—LIABILITY OF ADMINISTRATOR TO ACCOUNT.

—An administrator, with the will annexed, purchased and took an assignment to himself, in his individual capacity, from the assignees, to whom the deceased, being a bankrupt had, in his lifetime, assigned all his property to pay his debts. The assignment to him was of all their right and title in the assignment from the deceased. There was a surplus after satisfying the debts, which in the first assignment was agreed to be paid to the assignor. It was held lawful for the assignees to reassign; and the reassignment to the administrator, though made to him individually, had the effect only of a release or discharge by the assignees of the deceased from their demands under the assignment, and so was to be considered a reconveyance to the administrator in his representative capacity, and therefore the money recovered by such administrator, under such assignment, became assets in his hands, for which he should account.

**ASSIGNMENT UNDER FOREIGN LAW.**—An assignment by commissioners of bankruptcy in a foreign country, does not operate as a legal or equitable transfer of the property of the bankrupt elsewhere, so as to prevent a creditor in another jurisdiction from resorting to such property or debts for payment, or the bankrupt from transferring the same.

**RIGHTS OF LEGATEES, BY WHAT LAW GOVERNED.**—The rights of legatees, especially of residuary legatees, as well as of the next of kin, depend upon the laws of the country where the deceased had his home; and to this end all the choses in action and personal effects are to be deemed local, to be there accounted for, and finally administered where collected, or accruing in possession to the executor or administrator.

DEBT upon a bond, dated March 17, 1801, made to the plaintiff, as judge of probate of Suffolk county, by the defendant, Ward N. Boylston, as administrator *de bonis non*, with a copy of the will of Thomas Boylston, late of London, annexed, pursuant to the statute of 1785, c. 12. The action was prosecuted for the benefit of the inhabitants of Boston named as residuary legatees in said will. The defendant pleaded in bar a performance

of the condition of the bond, and alleged that the sums of money claimed in this action had been recovered from the representatives of Moses Gill, by whom they had been due to defendant's testator, by the defendant in his individual capacity, by virtue of an assignment to defendant from the testator, and had not been recovered by defendant in his character of administrator. The circumstances under which the assignment was made, and the questions raised by the pleadings, appear from the opinion of this court, before whom the cause came upon a demurrer to the rebutter.

*Dexter and Morton, Attorney-general, for the plaintiff.*

*Otis and Jackson, contra.*

By Court, SEWALL, J. The general question to be determined upon these pleadings is, whether the judgment recovered by the defendant, as administrator of Thomas Boylston, against the executor of the last will of Moses Gill, esq., deceased, so far as payment and satisfaction have been obtained, is to be inventoried and accounted for by the defendant, according to the condition of his bond of administration, given to the judge of probate for the county of Suffolk when the defendant's letters of administration were granted. If, on this question, the decision should be against the defendant, there arises another question, of the authority of this court in this particular case; of the liability of the defendant, in this jurisdiction, in an action prosecuted at the instigation of the residuary legatees named in the last will of Thomas Boylston. Against the accountability, which seems to result from the nominal description of the property in question, the defendant alleges a title in himself to the demands for which that judgment was recovered—an assignment thereof for a valuable consideration paid by himself. Upon this assignment he relies, as vesting in him an exclusive right, an authority to retain to his own use, and without account, all the effects of that judgment, recovered in name only by the administrator of Thomas Boylston, deceased.

The title of the defendant, of which the burden of proof certainly rests upon him, is thus derived, according to the facts disclosed in the pleadings, and not traversed or contested so far as they are material to the defense or the maintenance of this action. The immediate assignment to the defendant is by an indenture of two parts, dated the twenty-fourth of August, 1799, from George Lee and others. They acted therein and claimed to act as assignees, under a commission of bankruptcy,

which had been issued against Thomas Boylston and Messrs. Lane & Frazier, and by virtue of a special assignment from Thomas Boylston, in his life-time. That assignment, by an indenture dated the first of March, 1794, was made, as it appears, for the purpose of carrying into effect certain proposals on his part, assented to by the assignees and certain creditors, under the commission of bankruptcy, parties to the instrument. By this indenture, Thomas Boylston, among other things, assigns and conveys to Lee and others all the real and personal estate which he had before placed in the hands of Moses Gill and others, by certain voluntary conveyances without consideration, and which are thereby revoked, and all other his personal estate, moneys and securities for money, goods and chattels whatsoever, with certain exceptions not important in this inquiry, upon trusts afterwards mentioned. The writings by which these several assignments are understood to have been effected, are, in the case by the profert of them, and by the oyer, granted in the pleadings; and the construction and effect of these instruments, so far as the defendant's claim and title are concerned, is the important inquiry, upon the result of which the decision in this action depends.

By the indenture to which Thomas Boylston was a party, his separate debts, an annuity for four years, and a gratuity of five thousand pounds to him personally, are to be paid out of the estate and effects to be recovered from Moses Gill and others, and out of his other separate estate and effects; subject to which the whole are made and declared to be, with the estates and effects of Lane & Frazier, a security to all the joint creditors of Lane, Frazier and Boylston, for a composition of fifteen shillings in the pound, of the debts proved, etc., under the commission, payable in certain installments, which were to be completed on or before the last day of March, 1798, and to be accepted in full by the creditors of the partnership. And the assignees and creditors covenant that, when all the trusts in favor of the creditors shall be fully performed, they will consent to a *supersedeas* of the commission, and that it shall be lawful for the assignees to reconvey all the said estate and effects then in their hands to the said Lane, Frazier and Boylston, according to their respective rights and interests therein. There is a reliance also for the plaintiff on the implied trust to the same purpose, which is said to be understood in every assignment under a commission of bankruptcy—viz., that when the effects assigned are found to exceed the amount of the debts proved under the commis-

sion, the surplus of the bankrupt's effects are to be reconveyed to him, whether the commission is or is not superseded.

These trusts, by which a remaining interest and equity continued in Thomas Boylston, in the effects he had assigned, have rendered material the averments in the surrejoinder for the plaintiff, and those for the defendant in his rebutter. Of these allegations, the most important in considering the general question of the defendant's title are the circumstances which are to be taken as confessed; that the defendant when he contracted with the assignees of Thomas Boylston for an assignment of the demands vested in them against Moses Gill, was administrator with the will annexed of Thomas Boylston, by letters of administration obtained from the prerogative court of the archbishop of Canterbury, in which the same will had been proved on the fifth of April, 1799; that the defendant then had in his hands, of the effects of the testator, a large sum of money, much exceeding the sum required for the contract and purchase; that, with the sum paid by the defendant, the assignees held of the effects assigned, more than sufficient to pay all the debts of Thomas Boylston and the composition upon the debts of Boylston, Lane and Frazier; and that all their creditors respectively have been since fully satisfied, so far as the assignees, or the effects holden by them, were liable. On the other hand it must be understood and considered that this sufficiency of the estate and effects assigned was unknown, and had not been actually realized by the assignees, at the time of the assignment by them made to the defendant; and that a large sum of money was then due to the creditors of Thomas Boylston, and of Boylston, Lane and Frazier, for which the effects in the hands of the assignees were then liable. The circumstance, also, that the purchase was made with the defendant's own money, and not with the money in his hands, as administrator, deserves attention; as it is averred and admitted by the pleadings that the defendant has paid seven hundred and fifty pounds sterling for the assignment to him. But with this is to be considered the amount of the judgment recovered being, as averred, upwards of one hundred thousand dollars, or more than twenty-two thousand seven hundred pounds sterling.

Some objections have been urged in a general view of this subject, upon the ground that choses in action are not assignable, and that the assignees under the commission, had no authority to assign, or transfer these demands to the defendant. Choses in action have been for a long time considered as assign-

able, as to the beneficial interest and property; and numerous decisions to that effect may be cited in which the principle has been established and enforced as well in courts of law as in equity: Com. Dig. Assignment, C. 1; 1 T. R. 26, 619; Ca. Ch. 169. The remedy is still subject to some restriction, not affecting the contract of assignment, but requisite to the security of the party liable by the contract assigned, where the transfer has no aid from any statute provision or particular usage as in cases of negotiable notes and bills of exchange, and assignments under the statutes of bankruptcy: 2 Vern. 692, 765. In this last case, however, an assignment by commissioners, if effectual after notice to the debtor of the bankrupt so far as to vest in the assignees the beneficial interest property, would not be allowed, with us, the operation, which such an assignment has in England, of giving to the assignees a remedy in their own names upon the debt assigned. Respecting debts, therefore, recoverable in this jurisdiction an assignment under a commission of bankruptcy is not more effectual than it would be if obtained from the bankrupt, by an instrument to which he should be a party in fact.

The power of the first assignees to reassign seems to be understood in several provisions of the bankrupt laws, and is, in every case, the result of an absolute property and right vested by an assignment from a creditor of all his interest and demand, with powers of attorney and substitution granted to his assignee. The right of the assignee of a chose in action is not defeated by the death of the assignor. But the contract of assignment entitles the assignee to the aid, and authorizes him to use the name of the executor or administrator. It results, of course, that in such a case the executor or administrator is not accountable for the judgment which may happen to be recovered in his name, the beneficial interest and property having belonged to another, and not to the testator or intestate at the time of his death: Com. Dig. Bankrupt, D. 24, Skin. 232; Lovelace, 47; Shep. Touch. 497.

Thus far the title and claim of the defendant, under the assignment from Thomas Boylston to Lee and others, and their assignment to the defendant seems to be maintained against all the objections which have been urged either from a supposed want of authority in the assignees to reassign, or their special trust, as acting under a commission of bankruptcy, as well as under a contract with Thomas Boylston, for a composition of the debts of the partnership. The particular case of a judgment

recovered by an administrator, upon demands and choses in action, which had been assigned to him in the life-time of the intestate is indeed unusual. But, allowing that his name is to be used to the same purpose by any other assignee, we know of no rule or principle of law which will avoid the effect of the assignment, because of the concurrence of administrator and assignee in the same person, or prevent a recovery, in that case, to his own use, and without account.

The inquiry is thus narrowed, in our opinion, to the questions which have been argued respecting the operation of the assignment to the defendant, whether the property and demands thereby assigned were transferred to him, to his own personal use and benefit; or that the assignment has the effect only of a release and discharge by the assignees of Thomas Boylston from their demands, and is to be considered as a reconveyance to his representative, vesting the property assigned in the defendant as administrator. The counsel for the defendant rely upon the tenor of the instruments of assignment, their legal construction and effect and the fact of a consideration paid by the defendant from his own money, adequate, it is said, considering the uncertain amount and value of the demands assigned, and at least sufficient for the purpose, where the assignors were intrusted with the absolute disposal of the property assigned. The counsel for the plaintiff, or rather for the legatees of Thomas Boylston, at whose promotion this suit is brought, have rested their principal argument upon the relations of the parties in the assignment immediately to the defendant. It is argued that he is accountable and to be charged for the judgment recovered against the executor of Moses Gill or for the effects received thereon, because the assignment under which he claims was made to him by trustees accountable at the time to him as administrator; because the interest transferred was a property for which, upon their trust, they were then liable to the representatives of Thomas Boylston; and because the defendant, who now claims as assignee, or purchaser, having, at the time of his purchase, the office of administrator with the will annexed, was himself the trustee of the creditors and legatees of Thomas Boylston, and therefore, at their election, he is to be considered as having redeemed a mortgage or pledge of the testator, which becomes assets for the performance of his last will.

As to the title of the defendant, so far as it depends on the tenor of the two indentures and the intentions therein expressed of the several parties to those instruments, we have not been

able to discover, from a careful examination of them, any recital or stipulation which militates with the claim of the defendant. Independently, altogether, of the operation of the statutes of bankruptcy, by the deed and assignment of Thomas Boylston to Lee and others, the assignees under the commission, they became entitled to all the personal estate, moneys, and securities for moneys, goods and chattels of Thomas Boylston, whatsoever and wheresoever. Our opinion of their authority to reassign we have already intimated; and in the indenture between Lee and others, the assignees under the commission, and the defendant, in which the indenture, whereto Thomas Boylston was a party, is carefully recited, and in pursuance of an agreement recited to have been made with the defendant by George Erving, one of the assignees, and for divers causes and considerations, and a nominal consideration of ten shillings, the assignees bargained, aliened, released, and assigned unto the said Ward N. Boylston, and his heirs, "all those messuages and lands in the town of Boston, and other parts of the state of Massachusetts Bay, which, by the recited indenture, Thomas Boylston had covenanted and agreed to convey, etc., as the assignees should appoint, etc., subject as in that indenture mentioned. Also, for the same considerations, etc., and in further performance of the agreement aforesaid, the said Lee and others, assignees under the commission of bankruptcy, bargain, sell, assign, transfer, and set over, all and every the debts and debt, rents and arrears of rent, sums and sum of money, and all other the personal estate and effects whatsoever, late of the said Thomas Boylston, deceased, which, under and by virtue of the said indenture of March 1, 1794, the said Lee and others now are entitled to demand against or from the said Moses Gill, his executors or administrators, and which now remain due and recoverable, etc.; to have, hold, receive, take and enjoy the said debts, rents, sums of money, etc., as assigned to the said Ward N. Boylston, his executors, administrators and assigns, as his and their own proper goods and chattels forever." And he is then appointed the attorney of the assignees, to demand, etc., in their names, etc., and he covenants on his part to indemnify them against his acts in their names, by virtue of the powers granted.

The words, "subject as in that indenture is mentioned," connected as they are immediately with the transfer of real estate, must, we think, have reference to the recital of possible charges and incumbrances, to which the messuages and lands in Boston and other parts of the state may be supposed liable.

To understand this reference as including the trusts and limitations upon the property of the assignees, would render it inconsistent with the general purpose of the instrument and contract. And upon the whole, if it was competent to the defendant to purchase the property in question to his own use, the indenture of two parts, in which he was a party, is sufficient evidence of the intentions of the assignees to sell, and of the defendant to purchase to his own use; and their contract must avail accordingly. When called upon, however, to give to this instrument the effect of a conveyance and transfer, to the exclusive benefit and use of the defendant, the nature and situation of the property intended to be transferred become very important considerations.

The demands assigned, upon which the contest in the case at bar has arisen, were not recoverable at the time of the assignment, but by the intervention of an administrator in this jurisdiction, where the debts were due and the debtor was then living. Nor, as we conceive, were those demands recoverable here for the benefit of the assignees under the commission of bankruptcy, to the exclusion of any creditors of Thomas Boylston, if any should be within this jurisdiction: *Le Chevalier v. Lynch*, Doug. 170. The trusts and purposes for which these demands had been vested in the assignees were nearly fulfilled. The last installment, it is said, had not been paid, although the time had elapsed; but it must be presumed, upon the facts averred, that their claims upon the property of Thomas Boylston, under his deed to them, and the sufficiency of the effects in their hands to respond to those claims, were at that time capable of being ascertained to a great degree of certainty; and beyond that amount, for the whole residue of the property intrusted with the assignees, they were in effect the trustees of Thomas Boylston, and of his representatives after his decease, accountable in this relation both by the operation of the bankrupt laws and by their express stipulations in the indenture between them and Thomas Boylston, by which his effects, and these demands in particular, are understood to have been assigned. The authority to exact this account, to enforce the execution of the trust, in which the assignees were then, in fact, liable, vested in the defendant upon his administration; and it had become his duty to exercise this authority for the use and benefit of the creditors and legatees of the deceased testator. Indeed, the rights of Thomas Boylston, resulting from the limitations upon the property of the assignees in the effects assigned to them, and from

their covenants to reconvey as soon as all the trusts in favor of the creditors should have been fulfilled, were in the nature of choses in action, which had vested in the defendant as administrator.

In this distinct responsibility of the defendant under his administration, and of the assignees under their assignment, consisted the legal security of the creditors and legatees of Thomas Boylston, that whatever residue should be found to have remained of his effects would be recovered and accounted for to their use. And if this security has been lost, and with it their just expectations upon the effects of Thomas Boylston in the hands of his assignees, it must be because the defendant, acting by virtue of his office, had authority to relinquish demands and rights vested in him as administrator, without any consideration to those prejudiced thereby, or any accountability on his part. The assignees protected themselves by obtaining the consent of the creditors under the commission and compromise, and by dealing with the defendant, the other party to whom the assignees had, as the event proved, become in fact accountable. His acceptance of the assignment, being at the time administrator, operated as a discharge to them; and if this bargain is to be confirmed upon the terms which have been urged for the defendant, he gains indeed, but at the expense of those who had rights not subjected to his disposal by any privity of contract. Whether they were so subjected by the act of law under which, and not by the appointment of the parties concerned in interest, the defendant derives his authority and trust as administrator, remains to be considered.

To decide upon the case thus presented, we have not thought it necessary to examine very extensively the rules of chancery respecting trustees, and the restrictions upon them in the disposal of estates and property, under that form of trusts which are cognizable in courts of chancery exclusively. It is said, and perhaps justly, that a court of chancery is alone competent to enforce the principles asserted in cases of that kind, according to the decisions cited in the argument; that the particular application of them now contended for is recent even in England; and that this court, as a court of law, has never adopted those rules and restrictions, or exercised any jurisdiction in cases of trust. It should be recollected, however, that executors and administrators are trustees, and amenable as such in courts of law, as well as in those of chancery jurisdiction.

It has appeared to us that this case may be very satisfactorily

decided upon rules and principles familiar in practice, generally known, and as usually enforced and observed in courts of law, as in courts of chancery jurisdiction. I allude to the rules and principles respecting the office and duty of executors and administrators; that part of our system of jurisprudence derived to us from the land of our ancestors, which, with a few alterations of a practical nature, continues the same in both countries. The personal estate of a testator or intestate vests in his executor or administrator, including his bonds, contracts, promises, and other choses in action, as well as his goods and chattels. These are holden in *autre droit*, and not as an absolute property, until acquired by an administration and account. If an executor or administrator release a debt or any contract, by which his testator or intestate was entitled to a sum of money or other advantage, the release is in his own wrong, and he is chargeable for the amount or value. If he compound debts or mortgages, and buy them in for less than is due upon them, the executor or administrator is not to have the advantage to himself; but it belongs to the creditors, or legatees, or party entitled to the surplus. If an executor redeem a pledge of the testator, it shall be assets in his hands to pay debts and legacies: Com. Dig. *Administration*, B. 10, 18, C. 1; Dyer, 2; Mo. 2; Kel. 62; 1 Salk. 156; 27 Hen. VIII, 6, a.; 1 Vern. 39, 336, 464, 476; Com. Dig. *Assets*, B. C.; Id. *Chancery*; 1 Leon. 225; Roll. 921; Cro. Eliz. 810; 1 Co. 98; Godb. 29; Fitz. 91; Plowd. 292. In short, the general principle asserted in all those cases seems to be, that executors and administrators are trustees, who are plainly incompetent, without the intervention and approval of the jurisdiction to which they are accountable, to acquire to themselves any part of the property committed to them in trust, or to make any advantage to themselves, personally and exclusively, by any relinquishment, forbearance, or neglect of the demands, choses in action or rights in equity, which their testators or intestates had at the time of their death, and which, by legal construction, devolve upon their executors or administrators. In the decisions cited, and which appear to have been regulated by these principles, it is not particularly stated that the executor or administrator had or had not expended his own money in redeeming the pledge, or in compounding the debt or mortgage of his testator or intestate. This circumstance, however, must, we think, be immaterial; it is the particular relation, it is the office and trust of an executor or administrator, which alone are and ought to be regarded.

In the case at bar the defendant is to be considered as having intended, in the purchase of the property in question, to divest himself of the relation and trust of administrator. But we cannot, as we apprehend the law upon this subject, confirm or give effect to this intention. The transaction, if confirmed, would be in itself a *devastavit*. A valuable interest and right derived to the defendant from the testator, has been, by his contract with the assignees, impliedly relinquished and defeated. An equitable interest, a covenant for a reconveyance of choses in action of the testator, which had vested in the defendant as administrator, the value of which, so far as the property now in question was concerned, is ascertained by the judgment recovered by him as administrator, have been wasted by himself, unless the effects collected and received in satisfaction are to be considered as assets in his hands, holden by the defendant, subject to the remaining debts of the testator, and the uses of his last will, and we must sanction a breach of trust, and allow it the peculiar advantages of an equitable title to admit the exclusive claims of the defendant upon this property. These are, therefore, to be disregarded, whatever may have been the intentions of the defendant in purchasing, or of the assignees of Thomas Boylston in their sale and assignment of the property in question.

The other objection which was insisted on in the argument for the defendant, and upon which his liability in this action has been further questioned and disputed is suggested by some of the averments in the plaintiff's surrejoinder. It may be doubted, however, as the pleadings stand, whether a defense of this kind is open to the defendant after setting up in his rejoinder an exclusive right in the property collected as an answer to the plaintiff's action. But upon this point it may be admitted that, although the action were maintainable in form for the plaintiff; yet if it now appeared upon the whole record that a judgment therein would not avail to any beneficial or suitable purpose, this objection alone is to be regarded as a sufficient cause for a stay, at least, of the proceedings. It is apparent, then, from the manner in which the writ in the case at bar is indorsed, and from many of the circumstances disclosed in the pleadings that the judge of probate of the county of Suffolk is plaintiff in this action in his official character, without any other interest, and that the inhabitants of the town of Boston are the persons at whose promotion this suit is prosecuted, or who may be supposed to have any beneficial interest in the de-

vision or event of it. No other interest in the suit is disclosed, and their interest is derived altogether from a residuary bequest in the last will of Thomas Boylston. It is also averred in the surrejoinder that long before, as well as at the time of his death, this testator had been and was resident in England; that there his last will has been since proved and allowed in the prerogative court of the archbishop of Canterbury, where letters of administration with this will annexed have been granted to this defendant. It must be understood, therefore, as a matter of necessary inference, if it is not directly asserted that the testator's place of domicile was in England, and that his effects were in a due course of administration there before the allowance of the same will and the registration thereof in the probate court of the county of Suffolk, or the letters of administration therewith granted to the defendant to be exercised within this jurisdiction, where, and upon which occasion, the bond was required of the defendant, which is to be enforced in this suit.

These facts and circumstances are also to be considered with a due regard to the general principles which have been urged upon the attention of the court, and to which we shall readily adhere as they have been heretofore recognized and adopted in the decisions of this court: *Richards v. Dulch*, 8 Mass. 506. The rights of legatees, especially of residuary legatees, as well as of the next of kin, in a case of intestacy, depend upon the laws of the country where the deceased had his home and domicile, from whom the bequest or succession is claimed; and to that purpose all the choses in action, and personal effects are to be deemed local, to be there accounted for and finally administered, wherever collected, or accruing in possession to the executor or administrator. The administration granted within this state has been justly styled ancillary, in respect to the administration in the jurisdiction of the prerogative court. The defendant has an authority to collect and to pay debts, and is liable for the contracts and duties of the testator, recoverable, and which may be enforced, within this jurisdiction; but is not liable in the court of probate, upon any partial account to be there rendered and adjusted to a decree either of payment or of distribution, whether for a legacy or to any claiming by a supposed succession of the deceased's effects.

Thus far the argument for the defendant may be adopted, but it is no necessary consequence that this action is not to be maintained, even at the promotion of a legatee named in the

last will, with which the defendant's administration is connected to the effect of compelling an inventory, or an account of assets collected by the defendant, by virtue of his authority to administer within this jurisdiction. The bond in which the defendant is holden is a lawful bond, taken according to the directions, or within the intent of the statute of 1785, which provides "for the filing and recording of wills proved without this government," in short, the provision of law in which the defendant's authority to collect the effects of Thomas Boylston within this state originates.

When a will proved in any foreign state or kingdom is directed upon due proceedings, to be filed and recorded in any probate court of this government, the judge of probate may thereupon proceed to take bonds of the executor, or grant administration of the testator's estate lying in this government, with the will annexed, and settle the estate in the same way and manner as by law he may or can the estates of testators, whose wills have been duly proved within the government. Letters testamentary or of administration are not to be granted, but upon a bond to account. Every administrator, before he enters upon the execution of his trust, is to give a bond to this effect, among other things. Upon the ground resorted to in the argument for the defendant, bonds taken of executors, or upon an administration granted in the case of a will proved in a foreign state or kingdom, would be generally nugatory and of no effect, and indeed without any meaning or purpose in every case where the testator had his domicile abroad; if the just construction be that the judge of probate is incompetent to sue for the purpose of obtaining an inventory and account of the effects collected within this government.

In ordinary cases, there would be no doubt of the competency and authority of the judge of probate to sue for the penalty of an administration bond, where an administrator had refused or neglected to account upon oath for such property of the intestate as he had received. This was formerly questioned, and the authority of judges of probate was supposed to be restrained by the provisions of the statute of 1786, c. 55, for regulating the proceedings on probate bonds in the courts of common law. In the appeal already mentioned to have been decided in the supreme court of probate, the objection to an action upon a probate bond, in this view of it, was anticipated and fully considered, *Selectmen of Boston v. Boylston*, 4 Mass. 318; and it is consequence of the decree then pronounced, that this action has

been brought and prosecuted. The grounds of that decision have been carefully reviewed; and the construction there given of the provisions of the statute, respecting suits upon probate bonds, is, we think, correct. And we see no cause to distinguish this case from any other in which the judge of probate is called upon in the exercise of his judicial discretion and of the authority he is invested with, for the use and benefit of whoever may be concerned, to enforce a bond of administration for the purpose of procuring an inventory or account of assets. It may be received as a reasonable construction, in a general view of this subject, that in every case designated, where the requisite steps have been pursued, according to the provision of the statute, the administration bond is to be considered as virtually assigned to the party interested, thus proving his interest: Burns' Eccl. L. 230; 1 Salk. 316; 3 Atk. 248; Str. 1137. But there are other cases, in which the original authority of the judge of probate remains unimpaired; and in which suits are to be commenced and prosecuted by virtue of decrees and orders established in the probate court; and which are not to be sustained, unless in that manner authorized and avowed.

The case at bar is of the latter description; and the jurisdiction here exercised for this special purpose does not interfere with, but is still auxiliary to, the jurisdiction, where probate of the last will of Thomas Boylston has been granted, and the administration of his effects is pending; a jurisdiction admitted to be exclusive, in whatever concerns the final settlement of his estate, the ascertaining of the residue after payment of the debts, and the appointment and distribution thereof. But then it is obvious, and it will be understood as the principal ground of this decision, and the reason which disposes the court to sustain this action, that this is not a case in which the supposed residuary legatees are to have an execution immediately, and in their own names, for the sum in which the defendant shall be awarded to be chargeable and accountable; or for the penalty of the bond, in case the defendant is not entitled to any relief against the forfeiture, by the aid of the chancery powers of this court.

We are at present inclined to the opinion that the defendant is entitled to this aid under the particular circumstances of this case; but as it is understood that a hearing in chancery will be assented to, and that nothing more will be insisted on against the defendant than an account of the assets received, in which a fair allowance of disbursements will be acceded to on the

part of the supposed residuary legatees, it is unnecessary to express an opinion as conclusively formed upon this point in the cause.

Upon the whole, the defendant's refusal to acknowledge, as assets in his hands as administrator, and to account for the effects received and collected upon the judgment recovered by him against the executor of the last will of Moses Gill, deceased, confessed by the pleadings, is a forfeiture of the bond declared on; and the defendant's rebutter is adjudged bad and insufficient in law. The ill state of Judge Sedgwick's health for a long time preceding his lamented death, may be mentioned as the principal occasion of the unusual delays which have occurred in the progress of this suit to a final decision; two other members having withdrawn themselves, because of their supposed liability to an imputation of interest. This cause has been thus necessarily decided with less aid in the discussion than is peculiarly desirable, where questions of a novel impression arise, and to the decision of which important consequences are attached.

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### GARLAND v. SALEM BANK.

[9 Mass. 408.]

**MONEY PAID UNDER MISTAKE.**—The indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days, the indorser, having discovered his mistake, and the money not yet having been paid over, reclaimed it from the company. It was held the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder.

**ASSUMPSIT** for money had and received by the defendants to the plaintiff's use. The plaintiff proved payment to the bank of one thousand five hundred and seven dollars, the amount of a note drawn by one Low, October 22, 1810, payable to the plaintiff or order within ninety days from date, and by him indorsed in blank. The note had been deposited with the bank by one Hovey, to be collected for the use and account of Thomas Cross, of Portland. At the time of this deposit and until within a few days of the payment, which was on the fifth March, 1811, the plaintiff was absent, employed in a coasting voyage to Baltimore. On the twenty-eighth of January, the bank sent a notification and demand of payment to Low, and a similar notification to the residence of the plaintiff, which no-

tification was returned in consequence of the absence of the latter's family from town. On the thirtieth of January, Low became notoriously insolvent. The plaintiff had no store, nor any accredited agent appointed for the transaction of his business during his absence; but one Daland attended to plaintiff's correspondence when he was away; and Moriarty, the cashier of the bank, represented plaintiff in the collection of a note which became due prior to his return. On the thirty-first of January, Moriarty informed plaintiff by letter of Low's failure and the non-payment of the note, and advised plaintiff to secure himself by attaching Low's property. Pursuant to instructions received in reply, Moriarty did attach certain of Low's property. On the fifth of March, plaintiff, having returned a day or two before, called at the bank, and paid the amount of the note which he took up. This payment was then placed to Cross's credit in the bank, in an account then opened and commenced with him, and he was informed of such payment by Hovey. It did not appear that at that time plaintiff had any knowledge of the neglect which had occurred respecting the demand and notification upon the note; but on the eighth of the same March, the plaintiff, by inquiries at the bank, received information of the time and manner of demand and notice, and then reclaimed the sum paid on the note, forbade the paying it over to any one, gave notice that he had paid the same by mistake and in his own wrong, and offered to return the note and did tender it to the officers of the bank. On the sixteenth of March the sum paid by plaintiff was paid over to Hovey's order, in the presence and with the consent of Cross.

By a by-law it was declared that the bank should not be responsible for any irregularities respecting notes deposited for collection; and it appeared that the defendants received no compensation for collections. Subsequent to the commencement of this action, plaintiff relinquished his attachments upon Low's real estate, which was incumbered by previous attachments to more than its full value. Pursuant to instructions the jury found for the plaintiff the amount of the sum paid on the note, with interest from the service of the writ. Defendants moved for a new trial.

*Putnam*, in support of the motion. The plaintiff might have ascertained the facts before payment, and a mistake of law under such circumstances cannot excuse: *Chatfield v. Paxton*, Chitty on Bills, 171; *Bilbee v. Lumley*, 2 East, 471; *Lowry v. Bourdieu*, Doug. 471; *Coleman v. Wise*, 2 Johns. 165. Not having any

agent here in his absence, he cannot complain of a want of notice: *Chitty*, 155, 178. The transfer on the book of the bank amounted to an irrevocable transfer of the property according to the course of proceedings at the bank. If the plaintiff is entitled to the money he demands, he should look to Cross.

*Storey, contra.* The defendants were agents for the holder, and liable for moneys received in that capacity, to which the principal is not entitled, even without notice, if the money has not been paid over: *Sadler v. Evans*, 4 Burr. 1986; *Burrough v. Skinner*, 5 Id. 2639; *Hearsay v. Pruyyn*, 7 Johns. 179; and they are also liable, although the money may have been passed over in account, if no new credit has been given: *Buller v. Harrison*, Cowp. 562. Money paid in one's own wrong and by mistake may be recovered back: *Cripps v. Reade*, 1 T. R. 285; 4 Mass. 378; 3 Id. 74. A payment under mistake of facts is not binding: 5 Burr. 2672; 1 T. R. 712; 1 Bos. & P. 326; Doug. 638; nor is a payment under such a mistake of law as in this case: *Chatfield v. Paxton*, 5 East, 471, *in notis*; *Chitty*, 187; 4 Mass. 341. The indorser is entitled to strict notice: 4 Mass. 342; 4 Cranch, 146; 7 Mass. 449 [5 Am. Dec. 62]; 11 East, 114.

By COURT. Upon the facts in this case, it is our opinion that the plaintiff was under no legal obligation to pay the money which he did in discharge of the note which he had indorsed, as there had been no regular demand upon the maker. He paid the money under a misapprehension of the facts, as well as mistake of the law. It is true that the defendants acted in the character of agent for Cross, the holder of the note; but before they had done anything more than pass the amount received to the credit of Cross, they were informed that the plaintiff claimed the money to be repaid to him.

Judgment on the verdict.

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## BISSELL v. BRIGGS.

[9 Mass. 462.]

**FOREIGN JUDGMENT—VALIDITY OF.**—An inquiry as to the jurisdiction of a court, rendering a judgment in a foreign state, may be made, when a party in another state seeks to enforce such judgment. If the court had jurisdiction of the cause, it is, however, open to an inquiry on the merits.

**JUDGMENT OF ANOTHER STATE.**—The record of a judgment of any court of a sister state, when produced here, is not conclusive as to jurisdiction; for to be entitled to the full faith and credit mentioned in the constitution, the court must have had jurisdiction of the parties as well as of the subject-matter.

D~~EST~~ upon a judgment recovered in New Hampshire by the present plaintiff against the present defendant and one Gair. At the time of the service of the original writ on the defendants, they were inhabitants of Massachusetts, though they were served in New Hampshire, and took upon themselves the defense of the action. The original action was trespass *de bonis asportatis*, and a record of the judgment therein was produced in evidence, authenticated as required by the act of congress. The defendant insisted that it was competent for him to impeach the judgment by evidence showing that the plaintiff ought not to have recovered any damages; or if he was entitled to damages, yet that too great damages had been assessed.

The question raised was as to the competency of this evidence, and the conclusiveness of the judgment.

*Dexter*, for the plaintiff.

*Bigelow*, *contra*.

PARSONS, C. J. : As the effect of judgments recovered in other states in the Union, when produced in this court to maintain actions sued here on such judgments, has been the subject of much discussion, we have considered in some detail the effect which is allowed to foreign judgments in our courts. A foreign judgment may be produced here by a party to it, either to justify himself by the execution of that judgment in the country in which it was rendered, or to obtain the execution of it from our courts. If the foreign court which rendered the judgment had jurisdiction of the cause, the justification is admitted, and the regularity of the proceedings is not to be drawn into question. But if the foreign court had no jurisdiction of the cause, the justification will be rejected, without inquiring into the merits of the judgment. In such case, therefore, the judgment may be impeached, by showing that the court rendering it had no jurisdiction of the cause. If the judgment be produced by a party, to obtain the execution of it here, the question of the jurisdiction of the court rendering it is still open to inquiry. And if a defect of jurisdiction should appear, the party producing the judgment must fail without any inquiry into its merits. But, if the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the judgment, without first allowing an inquiry into its merits. The judgment of a foreign court, therefore, is, by our laws, considered only as presumptive evidence of a debt, or as *prima facie* evidence of a sufficient consideration of a promise, where such

court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, *nil debet* is the general issue; or, if it be made the consideration of a promise, the general issue is *non-assumpsit*. On the issues, the defendant may impeach the justice of the judgment, by evidence relative to that point. On these issues the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment.

Before the ratification of the confederation of the United States, all the courts of the several provinces, colonies or states, were at common law deemed to be foreign to each other, and judgments rendered by any one of them were considered by the others as foreign judgments. As some inconveniences resulted from this consideration of the judgments rendered in the neighboring colonies by debtors, after judgments against them, removing with their effects into the then province of Massachusetts Bay before satisfying those judgments, it was provided by the provincial act of 14 Geo. III, c. 2, that on judgments rendered in the courts of the neighboring colonies, actions of debt might be sued here, and that on a plea of *nul tiel record*, the records of those judgments, attested by the clerk of the court rendering the same, should be good and sufficient evidence of the records. By this statute, judgments rendered in the courts of the neighboring colonies could not be here impeached, provided the courts rendering those judgments had competent jurisdiction. For the statute is predicated on the fact that the defendants were, at the time of rendering the judgments, inhabitants of the colonies in which the judgments were obtained. This act was in force until the statute of 1795, c. 61, was passed. In the mean time by the ratification of the confederation, the several states agreed "that full faith and credit should be given in each of the states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Afterwards, a similar provision was made in the federal constitution, which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and power is given to the congress to prescribe the manner in which such acts, records and proceedings, might be proved, and the effect thereof. By an act of the first congress, c. 38, this power was executed; and it is therein enacted that records and judicial proceedings, authenticated as in that act is prescribed, shall have full faith and credit given to

them in every court within the United States as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken.

By the statute of this commonwealth already cited, 1795, c 61, actions of debt may be brought upon any judgment for debt, damages, or costs, rendered in any court of record of the United States, or of any other state in the Union in any court of record of this commonwealth holden for the county in which either party shall dwell, or in which the debtor shall have any valuable estate. This statute is now in force here; for we know of no provision in the federal constitution, or in any law of congress passed in pursuance of it, prohibiting any state from giving to judgments recovered in any other state any effect it may think proper, so that it does not derogate from the effect secured by the constitution, and the acts of congress passed under it.

But it does not appear to me to be material whether this cause is to be governed by our statute, or by the laws of the United States, as my opinion will rest upon the same principles. And I am satisfied that it was the intention of our own legislature, and also of the federal government, to place the judgments recovered in any of the courts of the United States on better ground than judgments rendered in any other state or country; and that judgments of this last description only can now be considered as foreign judgments. If such was not the intention, it is difficult for me to conceive on what ground so much care was taken, as well in the confederation as in the federal constitution, to give full faith and credit to judgments rendered in any of the United States. If it be supposed that all this care was taken to restrain any state from placing the judgments of the other states on a ground less favorable than judgments rendered in foreign states or countries, this supposition is defeated by the act of congress before referred to, which enacts that the judgments of any of the United States, duly authenticated, shall have in each state the same faith and credit given to them, as they have in the state whence they shall have been brought.

It has been further objected, on the part of the defendant in the case at bar, that the provision in the federal constitution has no force until congress declare the effect of judgments rendered in any of the United States, and that congress has made no such declaration. But this objection is founded on an erroneous construction of the constitution; for, by the express words of the constitution, all the effect is given to judgments rendered in any of the United States, which they can have by securing to

them full faith and credit, so that they cannot be contradicted nor the truth of them denied. And the future effect which congress was to give relates to the authentication, the mode of which is to be prescribed. In this sense the congress understood the subject; for, after providing a mode of authentication, it is enacted that judgments so authenticated shall have the same full faith and credit given to them in every state, as they have in the state from whence they were taken.

But neither our own statute, nor the federal constitution, nor the act of congress, had any intention of enlarging, restraining, or in any manner operating upon the jurisdiction of the legislatures, or of the court of any of the United States. The jurisdiction remains as it was before, and the public acts, records, and judicial proceedings contemplated, and to which full faith and credit are to be given, are such as were within the jurisdiction of the state whence they shall be taken. Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open to inquiry; and, if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment.

This question came before the circuit court of the United States holden at Exeter some years since. Dr. Scott, late of Boston, while he lived, was seised of lands in New Hampshire. His administrator obtained a license from the legislature of Massachusetts to sell those lands, and under that license they were sold. When the children of Dr. Scott came of age, they sued a writ of entry against the assignee of the purchaser to recover the lands. The license and sale under the authority of the state of Massachusetts were given in evidence in the defense; and the federal constitution and the act of congress were relied on. But the court were of opinion that the full faith and credit that were to be given to public acts of the legislature, were confined to those acts which a legislature had lawful authority to pass; and that it was not within the jurisdiction of the legislature of Massachusetts to license the sale of lands in New Hampshire. And upon the same principle, if a court of any state should render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts, if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment.

In order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties. To illustrate this position, it may be remarked that a debtor living in Massachusetts may have goods, effects or credits in New Hampshire where the creditor lives. The creditor there may lawfully attach these, pursuant to the laws of that state, in the hands of the bailiff, factor, trustee or garnishee of his debtor; and on recovering judgment those goods, effects and credits may lawfully be applied to satisfy the judgment; and the bailiff, factor, trustee, or garnishee, if sued in this state for those goods, effects, or credits, shall in our courts be protected by that judgment, the court in New Hampshire having jurisdiction of the cause for the purpose of rendering that judgment; and the bailiff, factor, trustee, or garnishee producing it, not to obtain execution of it here, but for his own justification. If, however, those goods, effects, and credits are insufficient to satisfy the judgment, and the creditor should sue an action on that judgment in this state to obtain satisfaction he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment. And if the defendant, after the service of the process of foreign attachment, should either in person have gone into the state of New Hampshire, or constituted an attorney to defend the suit, so as to protect his goods, effects or credits from the effect of the attachment, he would not thereby have given the court jurisdiction of his person; since this jurisdiction must result from the service of the foreign attachment. It would be unreasonable to oblige any man living in one state, and having effects in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached.

From this reasoning the conclusion is manifest, that judgments rendered in any other of the United States are not, when produced here as the foundation of actions to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the courts rendering them. Neither are they to be considered as domestic judgments, rendered in our own courts of record, because the jurisdiction of the courts rendering them is a subject of inquiry. But such judgments, so far as the court rendering them had jurisdiction, are to have in our courts full faith and credit. They may, therefore, be declared on as evidences of debts or promises;

and on the general issue, the jurisdiction of the courts rendering them is put in issue, but not the merits of the judgment.

When we look into the case before us, we find that the judgment, on which the present action was brought, was rendered in a court of record in the state of New Hampshire, against defendants who are named in the writ as of Boston, in this commonwealth; and it is agreed that when the writ was issued and served they were in the state of New Hampshire, and that the original process was served on them personally. It appears from the record, and is agreed, that they appeared to the writ and defended the action, and were thus parties to the judgment. Now, an inhabitant of one state may, without changing his domicile, go into another; he may there contract a debt or commit a tort; and while there he owes a temporary allegiance to that state, is bound by its laws and is amenable to its courts. The defendant Briggs must, therefore, be considered as a party to a judgment rendered against him by a court which had jurisdiction of the cause and of the parties to it. He cannot, therefore, in my opinion, be admitted by evidence to impeach that judgment or to deny it, or in any manner to derogate from the full faith and credit to which it is entitled.

PARKER, J., concurred.

SEWALL, J., delivered a dissenting opinion.

SEDGWICK and THATCHER, JJ., absent.

Defendant defaulted.

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The subject of this decision will be found examined at length in a note to *Bartlet v. Knight*, 2 Am. Dec., 36, where the doctrine of the principal case is shown to be in harmony with the late decisions of the United States supreme court.

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## JACKSON v. ADAMS.

[9 MASS. 484.]

**LIABILITY OF PRINTER OF PAPER.**—A printer of a newspaper is generally liable for carelessness in printing an advertisement; but not for incidental and remote consequences, though involving considerable loss and damage to his employer, where the printer was not particularly apprized of the necessity of correctness in the individual instance.

**ACTION** against the printers of a public newspaper in Boston for the incorrect printing of an advertisement relative to the sale of an equity of redemption, upon which the plaintiff, as

deputy sheriff, had levied an execution in favor of one Coolidge, by reason of which the levy failed, and the plaintiff had been compelled, by a suit at law, to pay a part of the amount of the execution to the creditor. It appeared in evidence that on the twenty-first of May, the plaintiff caused a notice of the sale to be written out and delivered the same on that day to one of the defendants for publication; that in the writing the sale was appointed to be on the twentieth of June then next, but that in the advertisement in defendant's paper, the day set was the twenty-eighth of June. The advertisement in this incorrect form was published three weeks successively, as required by law. The mistake was not discovered until the true day of sale, when the plaintiff caused the premises advertised to be bid off; but the purchaser learning of the mistake in publishing refused to accept a deed. The thirty days after entry of judgment having by this time expired, the premises were seized under an execution in favor of another creditor, and sold. In an action against the sheriff for failing to satisfy Coolidge's execution, the latter recovered judgment which plaintiff was compelled to pay. The defendants received compensation for the publication. It did not appear that plaintiff had warned defendants as to the necessity of accuracy in the publication; and it was in evidence that plaintiff was in Boston all the time the erroneous advertisement appeared.

The jury were instructed that the plaintiff should have cautioned the defendants to be careful, or should have examined the advertisement, and compared it with the original, or in some other way have ascertained that it was printed correctly or incorrectly; that allowing the publications to pass without examination, until it was too late to correct them, or seize the premises anew before the expiration of thirty days, was such negligence as deprived him of his action against the printers. Verdict for the defendants, and motion for a new trial.

*Sullivan*, for the plaintiff, urged that there was an implied promise on the part of the defendants to do accurately what they had undertaken to perform for a reward engaged to them; that this was the law of the land to which printers are no more an exception than any other class of tradesmen: *Coggs v. Bernard*, 2 Ld. Raym. 909; *Elsee v. Gatward*, 5 T. R. 143; *Thorne v. Deas*, 4 Johns. 84.

*Blake, contra.*

By Court, SEWALL, J. The undertaking of the defendants in this case being for hire, and in the exercise of their ordinary occupation, that of printing, they must be answerable for any neglect or mismanagement in the performance of their trust, and for any loss or damage which might have been avoided by that degree of care and diligence which their employer had a right to expect and rely upon. If, therefore, the printers were not misled by the writing of the advertisement delivered to them, as, for instance, supposing it now examinable, if twentieth was not so written as to be mistaken for twenty-eighth, supposing a suitable degree of attention on the part of the compositor, I think the defendants are liable in this action. For I can have no doubt that the master printers are liable for the default of their compositor or servant; and in this particular, the direction at the trial appears to me to have been incorrect; because the plaintiff may be entitled to a verdict for him, although a principal question will still remain to be decided, as to the amount of damages recoverable against the printers under all the circumstances of this case. And as applied to this, which is the most important question in the cause, I am inclined to think the direction at the trial was substantially correct.

The nature of the printer's undertaking is such as that a minute and perfect transcript of an advertisement delivered to him in writing, or an exact correctness in the first impression, beyond what may be expected from a general care and superintendence of his newspaper, is not to be understood in any contract for printing, where no special caution has been given by his employer, and no special undertaking has been expressed on the part of the printer. When any particular care or attention are requisite, it is the duty of the employer to suggest it, and to guard himself in this respect by cautioning the printer, or requiring a special guaranty of exact or material correctness in the first impression of a particular advertisement. In ordinary cases the printer publishes, relying upon some continued care on the part of his employer that he will examine and verify the impression, and for that purpose will give notice of, and will be attentive to have seasonably corrected any errors of importance, to some of which the business of composing and printing, even with ordinary care and diligence, is notoriously subject, without requiring an allowance for the hurry usual, perhaps, in printing newspapers, applicable to this particular case. The loss of the erroneous impression the printer incurs, and any extraordinary expense to procure another, which he

may be exposed to, for so far the employer is protected, even without his corresponding attention, upon which the printer may be supposed to rely.

But for incidental and remote consequences, which may prove to be, as in this case, losses and damages of a very considerable amount, the risk respecting them not having been notified or stated to him, and of which he has no warning, for these, I think, he is not liable upon what may be considered within the ordinary undertaking implied from his occupation. It is not to be supposed that he undertakes, for the pay of an advertisement comparatively inconsiderable, to have an exact correctness, independently of the attention of his employer, and without any special caution or notice, at a risk so very extensive in the amount. And even upon the supposition adopted in the argument, that by the delay in publishing the advertisement the opportunity of correcting or renewing it was lost, and all the consequences were inevitable, which in this case have been incurred at the expense of the plaintiff, I cannot consider the printers answerable for these damages.

The court concur in granting a new trial.

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### LENOX v. LEVERETT.

[10 MASS. 1.]

**BILL PAID FOR HONOR—DUTY OF HOLDER.**—When a bill of exchange is protested for non-acceptance, and afterwards taken up and paid for the honor of a party, the holder is still bound to the same duties, as to protest and notice, as if the bill had not been paid.

**ASSUMPSIT** on two bills of exchange, of which William Leverett, the defendant's intestate, was the indorser. The facts are: The bills were drawn by Fields, January 9, 1809, in favor of William Leverett or order, on one Dawson, London, payable sixty days from sight, and indorsed to the plaintiff, January 19; the bills were forwarded to the plaintiff's correspondents in London, and received by them on the twenty-fifth of the ensuing month; after diligent search by the latter's clerks, on that and the next day, it was ascertained that there was no such person as was named as drawee. On the first of April the bills were noted for non-acceptance, but there was no proof that a protest for non-acceptance had been made, except the written statement of Murdock & Co., by whom the bills had been taken up at their

maturity for the honor of the plaintiff, and paid on the third of June, 1809. On the fifth of April, 1809, plaintiff's correspondents wrote to him advising him of the non-acceptance and the acceptance for honor, and he immediately communicated these facts to Leverett. Murdock & Co. wrote to the plaintiff June 19, 1809, stating the protest for non-payment, and that the bills and protests had been forwarded. The bills and protests were not received however, and on the fifth of December, 1809, duplicates thereof were forwarded, and received in the following March. Fields was insolvent before the drawing of the bills, and in November, 1809, his credit was entirely gone.

Verdict for the plaintiff, which the defendant moved to set aside.

*Selfridge*, for the defendant, contended that there was no protest for non-acceptance produced, as was necessary to support the action: 2 T. R. 713; 5 Id. 239; 7 East, 359; 6 Mod. 81; 1 Salk. 131; 2 Ld. Kaym. 992; that the holder had been guilty of laches: 4 T. R. 175; 2 H. Bl. 569; 1 T. R. 168.

*Welsh, contra.* There was sufficient evidence of the protest for non-acceptance, and it was not necessary to produce it on the trial: 2 H. Bl. 509, 567; 2 Esp. 511; Bull. N. P. 269; Doug. 55.

**By COUNSEL.** The bills in this case, having failed of acceptance, were accepted and afterwards paid by a friend of the plaintiff, who had indorsed them for his honor. This payment did not vary the duties of the holder. He was still bound to cause them to be protested for non-acceptance, and, at their maturity, to cause them to be duly protested for non-payment by the drawee. He was also obliged to give the same notice to the antecedent parties to the bills, as if they had not been taken up.

In the case at bar, there was no legal evidence of a protest for non-acceptance. The holder is not obliged to forward such protest at the time; but he must give notice of the fact to such prior parties as he intends to resort to. When he institutes his action for the non-payment, both protests are to be produced.

Besides the want of regular evidence of a protest for non-acceptance there was, in this case, an inexcusable delay of forwarding the protest for non-acceptance; nor is the delay satisfactorily accounted for. The verdict must be set aside, and a new trial granted.

## SANDFORD v. DILLAWAY.

[10 MASS. 52.]

**DEMAND AND NOTICE.**—The maker's insolvency, although known to the indorser, does not excuse the holder of a promissory note from demand and notice.

**ASSUMPSIT** on a promissory note by the indorsee against the indorser. There was no evidence of any seasonable demand upon S. Dillaway, jun., the maker of the note, or notice to the defendant; but the plaintiff relied upon evidence to show that, at the time of the indorsement, which was on the day of the date of the note, the maker was insolvent, and that the defendant knew the same. A verdict was taken for the plaintiff, subject to the opinion of this court upon the necessity of a demand and notice in this case.

*Townsend*, for the defendant, cited: *Nicholson v. Gouthit*, 2 H. Bl. 609; *Jackson v. Richards*, 2 Cai. 343; *French v. Bank of Columbia*, 4 Cranch, 141; *Esdaile v. Sowerby*, 11 East, 113; *Smith v. Becket*, 13 Id. 187.

*Bigelow*, *contra*, cited: *De Berdt v. Atkinson*, 2 H. Bl. 336; *Corney v. Da Costa*, 1 Esp. 302.

**By COURT.** There have been contradictory opinions and decisions on the point brought before us in this case. We must settle it on the best principles that occur to us. The indorser of a promissory note contracts that he will pay the contents, provided the maker does not pay it when regularly demanded of him, and seasonable notice of his refusal or neglect is given to the indorser. This demand and notice he has a right, in all cases, to insist upon; for this reason, that, upon payment by him, he may have his remedy over against the maker. And although the insolvency of the maker renders his remedy less valuable, it does not necessarily render it worthless. The holder of the note is bound by the rule. In the case at bar, the plaintiff has not complied with it; and for this cause he is not entitled to a recovery. The verdict must therefore be set aside, and the plaintiff must be called.

Plaintiff nonsuited.

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*See Croome v. Hutchinson, ante, 55.*

## CHADBOURN v. WATTS.

[10 Mass. 121.]

**NEW NOTE FOR A USURIOUS OBLIGATION.**—A promissory note was given in payment of a debt, the promisor agreeing to pay a usurious rate of interest. After sundry payments of interest at the rate agreed, and of part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note being in part paid, was also canceled, and a third note given for the balance. In an action by the indorsee of the latter note against the promisor, it was held not to be tainted with the usurious interest paid on the first note.

**CASE** by the indorsee against the maker of a promissory note. The plaintiff was a *bona fide* indorsee for a valuable consideration, and ignorant of the circumstances under which the note was given, which were as follows:

The defendant, being indebted to Lancaster & Robie, partners, gave them his promissory note for the amount of the indebtedness, agreeing to pay interest at the rate of twelve per cent. per annum. After sundry payments on the note, the partnership was dissolved, and Lancaster took possession of the firm books and papers. Seven months after the date of the note, defendant gave Lancaster a second note for the amount due on the former note and twelve per cent. interest added thereto, and destroyed that note. Payments were made at different times on this note, when the defendant executed a third note for the amount remaining unpaid on the second note. Lawful interest only was calculated in determining what was due on the second note; and lawful interest only was reserved on the third note, which is the one declared on in this action. The question for the decision of this court is, whether this last note was affected by the usury in the original transaction?

*Todd*, for the plaintiff, cited *Ellis v. Warnes*, Moor, 752; *Cuthbert v. Haley*, 8 T. R. 390; *Turner v. Hulme*, 4 Esp. 11.

*Mellen and Adams*, *contra*, relied upon *Lowe v. Waller*, Doug. 736.

By Court, SEWALL, J. Against a promissory note sued by an indorsee, the maker and promisor defends himself by an attempt to prove it a usurious contract; and the defense is urged by his counsel, upon the authority of the case of *Lowe v. Waller*, to be sufficiently maintained by the facts admitted in the case at bar. In the case cited, the defendant, the acceptor of a bill of exchange, defended himself upon proof of a usurious con-

tract, in which the bill originated, and the defense prevailed against the second indorsees, who had paid a valuable consideration for the bill, and received it without any notice of the usury. Other cases and decisions were cited in the argument, in which the principles of that decision have been invariably recognized. Let us examine the ground of the decision; for as an objection of an unlawful consideration, which defeats a negotiable security in the hands of an innocent party, and for the benefit of a party to the illegal contract, the defense is almost singular in its nature and operation. And it will be perceived that it is the result of a positive rule, a provision of the statute of usury, that a contract to secure the payment of usury is not voidable only, but absolutely and from the beginning void, and therefore to be treated as if it never had any existence. The policy of this rule, in its operation upon other rules, such as the principles which have been adopted to secure the currency of negotiable notes, is not to be inquired into, when a case is found to be within the rule, the construction of which has been ascertained by a series of decisions.

Lord Mansfield was governed, in the case of *Lowe v. Waller*, by the authority of previous decisions upon the statute of gaming; in which the same words, employed by the legislature, had received the same construction, when the plea or defense was resorted to against a gaming contract, although negotiable in its form, and demanded by an innocent indorsee. But it will be perceived, in all the decisions cited, that the defense prevailed, where the security or contract containing the usurious interest was to be enforced; where, if the defense was not admitted, the party sued would be compelled to pay usurious interest by the form and tenor of the written promise, either as containing an amount of usury added to the sum loaned, or discounted from the note in giving it, or in some other mode of evasion, attempted against the provisions of the statute of usury. And the analogy stated between the statutes of usury and the statutes of gaming, as affording a rule of construction in this respect, expresses very definitely this restricted ground of the decisions. The law will not enforce a contract in itself unlawful, where the performance insisted on is unlawful, whoever may become the party in point of form, capable of enforcing the contract, and however innocent he may be. Is the case at bar within this rule, thus explained? Watts gave the note in question in discharge of a balance, amounting to five hundred dollars, remaining due to Lancaster, upon a note formerly given to him. That note was given for eight hundred and seventy-

five dollars; but neither of these notes secured or included any payment of unlawful interest; at least, there is no pretense that the note now in suit includes any; for, if any unlawful interest was included in the former note, that amount had been paid and received, and was wholly deducted, when this note was given. For receiving unlawful interest, the law punishes the party chargeable with it by a penalty specially provided in that case; and, as a further provision against usury, no obligation, in any form containing a contract which secures the payment of usurious interest, is recoverable, or can be enforced. But the two cases are not to be confounded. A contract which secures unlawful interest does not expose the party who considers himself entitled by it, if the usury is never received; and, on the other hand, an obligation, made to secure a lawful contract, containing no promise, agreement, discount or subterfuge for usury, although usury may have been received upon it, is not thereby defeated. The ground of decision in the case at bar may be illustrated by supposing the note of eight hundred and seventy-five dollars to have been the note indorsed, and to have contained a remnant of usury, from the usurious additions made to the sum borrowed upon the note preceding that. If the present plaintiff had demanded payment after the indorsement to him, and the defendant had thereupon paid three hundred and seventy-five dollars, and given his note to the plaintiff for the balance, could he, when that note was sued, object the usury lurking in the note taken up and discharged? It is clear that he could not. The case of *Cuthbert v. Haley*, cited at the bar, is like the case supposed, and the decision is in point. There the defense of usury, in bills of exchange discounted for usurious interest, against a bond given to an innocent indorsee for the amount due upon the bills, was rejected as inadmissible. Indeed, that case is stronger than the case supposed; for the bond included the usury, although innocently taken by the obligee. And the case at bar, if it differs from the case cited and supposed in any material circumstance, is still further removed from the taint of usury, considered as a demand between an innocent indorsee and the maker. The defendant is to be called.

Defendant defaulted.

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In a note to *Wilkie v. Roosevelt*, 2 Am. Dec. 149, we have shown that the decisions differ as to whether a note affected with usury is subsequently void in the hands of innocent transferees. The court, in the principal case, it is seen, assumes that it is void all the time; but the facts took the case out of the rule.

## MARTIN v. MAYO.

[10 Mass. 137.]

**PROMISE BY INFANT—RATIFICATION.**—An infant having for a sufficient consideration bound himself, after coming of age said to a third person: "I owe you and Mr. M. (the plaintiff), and when I return from this voyage, I will pay you both," and at another time said to the plaintiff, when payment was asked, that he was not then able for want of money, but after his return from a voyage he would settle. There was no evidence of any other dealings between the parties. This was held to amount to a ratification of his promise to pay after coming of age.

**ASSUMPT** against the defendants upon promises of their testator, James Weeks, before he became of age. The defendants relied upon the infancy of their testator at the time of entering into the engagements. As evidence of a promise after he came of age, the plaintiff was allowed to give in evidence the will of the deceased, to which the plaintiff was a subscribing witness, and which directed that certain disposition of his property be made "after all my just debts shall be paid, which I direct first to be done." It was also in evidence that after he came of age the deceased had said, "I owe you and I owe Mr. Martin" (the plaintiff then being present), "and when I return from this voyage, I will pay you both;" and that he again told plaintiff that he had not the money then, but would settle with plaintiff after returning from the voyage upon which he was about to sail. Weeks died at sea while performing the said voyage.

Verdict for the plaintiff, subject to the opinion of this court.

*Davies*, for the plaintiff.

*Hopkins*, contra.

By Court, SEWALL, J. There is already a decision of this court, in an action against the executors of James Weeks, that the reservation for his just debts, annexed to the residuary devise of all his estate, real and personal, in his last will, is not to be considered as a recognition or promise of payment of any particular debt; and that the plea or objection of infancy, to which any particular demand may be liable, remains open to them in point of law: *Smith v. Mayo*, 9 Mass. 62 [*ante*, 28]. And whatever our opinion may be of the good conscience or equity of such defense, or its consistency with a decent regard to the memory of their testator, we adhere to that decision. In the case at bar, the objection of infancy is made by the executors to the demands of the present plaintiff, one of which is upon a

promissory note given by James Weeks, and the other upon his receipt as a factor and consignee of the plaintiff, for an adventure of codfish intrusted with the testator, to be carried to Charleston, and there sold for the benefit of the plaintiff; Weeks promising to account for the same, and to pay over the proceeds, deducting half the profits. And it is proved that James Weeks, although at the time he made these promises and obtained this confidence and credit, was in active business and in full employment, as the master of a vessel, yet that he was in fact about six months short of twenty-one years of age. As a line must be drawn somewhere for the protection of infants, and as we know of no authority or decision where the established age has been departed from, we must yield to this evidence, and although reluctantly in this case, as these demands are not for necessities, but arose in the course of business, we must consider James Weeks, or rather his executors, acting reproachfully to his memory, and contrary to what we must believe would be his feelings and disposition in answering these demands entitled to the defense of infancy; unless it is repelled by the other circumstances proved in the case: 3 Cai. 323.

There is no question but that a promise made by an infant may be renewed by him after he comes of age, in a manner that shall make him liable as upon a promise made when of full age. But the counsel for the defendants contends that nothing short of an express promise is to have this effect; and that, in the case at bar, the facts stated or proved do not amount to an express promise. It seems to be stated by the later authorities, that a bare acknowledgment of the debt, or an admission of the consideration upon which the promise, while an infant, is alleged to have been made, or to have arisen by implication of law, is not sufficient in a case of this kind, as it is where the statute of limitations is pleaded, and the plaintiff replies a promise within six years: 1 Str. 690; 1 Ld. Raym. 389, 421; 5 Esp. 102.

But in the case at bar, James Weeks, after he came of age, and when called upon by the plaintiff for payment of his demands, answered in one instance, speaking to the plaintiff and another creditor, "When I return from this voyage I will pay you both;" and, in another instance, "that he had not the money then, but when he should return from the voyage he would settle with the plaintiff." It is admitted that there were no other dealings or demands between them. Now, upon any reasonable construction, it seems to be unquestionable that James Weeks, in these declarations made to the plaintiff han-

self, had an immediate reference to the demands now in controversy; and there is an express promise of payment, or of a settlement, which is the same thing. He assigned a reason, indeed, for not paying or settling at that time, and therefore postponed the performance of his promise until his return from the voyage on which he was then bound. But this was not a condition annexed to the promise. It is rather to be considered as a request of forbearance for the time proposed.

Upon the whole, our opinion is, that, independently of the will, which may be considered as irrelevant, the jury had sufficient evidence of a promise by James Weeks, after he came of age, to answer and pay the plaintiff's demands; which are sufficiently proved by the other evidence in the case. Certainty to a common intent is sufficient, where an express promise is to be proved: Com. Dig. Assumpsit, A. 4; Cro. Eliz. 149.

A question as to the form of declaring is waived, and judgment is to be entered according to the verdict.

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## COMMONWEALTH v. NEAL.

[10 Mass. 152.]

**LIABILITY OF FEME COVERT.**—An indictment will not lie against a *feme covert* for an assault and battery, committed in the company and by the command of her husband.

**INDICTMENT** against the defendants, husband and wife, for an assault and battery. The jury found the husband guilty and as to the wife, they returned specially, "that she committed the assault and battery charged in the indictment in company with, and commanded by the said John Neal, her husband. And if this in law will make her guilty, then the jury find her guilty; but if being in company with and commanded by her husband will justify or excuse her in law, then the jury find that the said Elizabeth Neal is not guilty."

*Whitman*, for the wife, cited: 4 Bl. Com. 28; 1 Mass. 391, 476; 10 Mod. 63, 335; 1 Salk. 384.

*Morton*, Attorney-general, *contra*, urged that the husband's commands were no excuse when the wife know the act was wrong: 1 Hawk. P. C. c. 1, sec. 9, 13.

**By Court.** The general doctrine is, that a *feme covert* incurs no legal guilt by the commission of civil offenses by the coercion of her husband, or even when in his presence. To this general

rule there are certain exceptions as of crimes forbidden by the law of nature, which are *mala in se*, and some where the wife may be presumed the principal agent. The case at bar is not within the exceptions, and Elizabeth Neal is not guilty, and must therefore be discharged.

The consideration of a husband's responsibility for the tortious acts of his wife embraces a discussion of his civil responsibility and of his responsibility criminally. The civil responsibility of the husband for the torts committed by his wife resolves itself into: 1. His responsibility for her torts committed in his presence, and by his direction; 2. His responsibility for her torts committed jointly with him; and, 3. His responsibility for her torts committed by her not in his presence, or not by his direction.

1. TORTS IN HIS PRESENCE AND BY HIS DIRECTION.—The disability attached to a married woman at common law in respect to many acts which she could have performed if *sole*, was turned to her protection in regard to her offenses against others, when committed under certain circumstances. The unity arising from the marital relation, and the presumption of superiority in the husband and his influence over his wife were reasons urged to exempt her from punishment for certain wrongs perpetrated by her when in his immediate presence. It was the presumed coercion of the wife by the husband that rendered him alone civilly liable for injuries occasioned by her tortious acts in his presence. The doctrine has been adopted in this country with some limitations. In the case of *Cassin v. Delany*, 38 N. Y. 178, Hunt, C. J., says: "The authorities are clear that when a tort or felony of any inferior degree is committed by the wife in the presence and by the direction of her husband she is not personally liable. To exempt her from liability both of these concurrent circumstances must exist, to wit, the presence and the command of the husband. An offense by his direction, but not in his presence, does not exempt her from liability, nor does his presence, if unaccompanied by his direction." So, also, *Brazil v. Moran*, 8 Minn. 236, a case of assault and battery; *McKeown v. Johnson*, 1 McCord, 578, a case of trespass; and *Curd v. Dodds*, 6 Bush, 681.

To constitute the coercion or constraint that will render the husband alone responsible, there are two essential elements: The presence of the husband, and a direction, command or threat that he was capable of enforcing. The fact that the offense was committed in the husband's presence is held to be evidence of such direction, but *prima facie* evidence only. "His presence furnishes evidence and affords a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence:" *Cassin v. Delany*, *supra*. And in *Marshall v. Oakes*, 51 Me. 308, it is said: "Such presumption, however, is but *prima facie*, and may be rebutted by the facts proved, showing that the wife was the instigator or more active party, or that the husband, although present, was incapable of coercion, or that the wife was the stronger of the two." So, also, in *Wagener v. Bill*, 19 Barb. 321; *Brazil v. Moran*, 8 Minn. 236; and *City Council v. Van Roven*, 2 McCord, 465; *Ferguson v. Brooks*, 67 Me. 251.

As to what will amount to a "presence" by the husband so as to raise the presumption of coercion, Justice Ames, in *Commonwealth v. Munsey*, 112 Mass. 287, says: "But in order to establish the fact of his presence it does not seem to be necessary to show that the act was done literally in his sight. If the husband were near enough for the wife to be under his immediate influence and control, though not in the same room, it is sufficient: *Common-*

*wealth v. Burk*, 11 Gray, 437. If he were on the premises, and near at hand, a momentary absence from the room, or a momentary turning of his back, might still leave her under his influence: *Commonwealth v. Welch*, 97 Mass. 593." Schouler, in his work on Domestic Relations, p. 104, also says: "The legal definition 'in company with' the husband should, however, receive a liberal interpretation so as to include all cases of constructive presence."

As it is the presumed constraint placed upon the wife by the presence of her husband that exempts her from liability, if it appear that the tort was committed out of the husband's presence though by his direction then she will be responsible with him; for being away from him, he could not enforce his directions, he had not the capacity to coerce: *Cassin v. Delany*, *supra*; *Marshall v. Oakes*, *supra*.

From these cases it results that to release the wife from liability for her torts it is necessary that the husband should have directed their commission, and should have, by his presence, actual or constructive, exerted such an influence over her as to compel obedience to that direction.

2. HIS RESPONSIBILITY FOR THEIR JOINT TORTS.—The sole responsibility of the husband for torts committed by him jointly with his wife, proceeds upon the same ground of coercion of the wife as referred to heretofore: *McKeown v. Johnson*, 1 McCord, 578, where a joint trespass was committed; *Meegan v. Gussolia*, 19 Mo. 417, a case of the withholding of real estate from a third person by the husband and wife; and *Dailey v. Houston*, 58 Mo. 361, a joint trespass; *Sisco v. Cheency*, Wright, O. 9; *Park v. Hopkins*, 2 Bailey, 411. It is conceived that the same rules as to presumption of constraint apply in cases of joint torts, as were laid down concerning the torts of the wife alone, committed in her husband's presence.

3. THE PERSONAL TORTS OF THE WIFE.—The rule of the common law that, for all torts of the wife committed not in her husband's presence, nor by his direction, he must be sued as a co-defendant with her, has been very generally adopted in this country. For the slanderous words used by the wife he has been held jointly responsible in *McElfresh v. Kirkendall*, 36 Iowa, 224; *Luce v. Oaks*, Id. 562; *Sunman v. Brewin*, 52 Ind. 140; *Fowler v. Chichester*, 26 Ohio St. 9; for her libel, in *Tait v. Culbertson*, 57 Barb. 9; for her assault and battery, *Coolidge v. Parris*, 8 Ohio St. 595; *Anderson v. Hill*, 53 Barb. 238; for her trespass, *McKeown v. Johnson*, 1 McCord, 578; *Whitmore v. Delano*, 6 N. H. 543; and the recent case of *Ferguson v. Brooks*, 67 Me. 251; for her burning of a mill, *Ball v. Bennett*, 21 Ind. 427. But in Massachusetts the statute of 1871, c. 312, provides that the husband must have aided, abetted, advised or otherwise encouraged the act, to render him liable for the torts of his wife: *Austin v. Cox*, 118 Mass. 58. There is also a similar statutory provision in Illinois: *Martin v. Robson*, 65 Ill. 129. Another departure from the general rule has been made in those states where it has been enacted that, as regards her separate property, the wife may sue and be sued alone. It is this: for injuries caused by the wife in the management and control of her separate property, she alone is responsible: *Baum v. Mulder*, 47 N.Y. 577; *Peak v. Lemon*, 1 Lans. 295. In this latter case, an action for a conversion by the wife of a property claimed as her separate property, it is said: "that she is liable, and that her husband is not liable, and that it is not the validity but the nature of her claim which becomes the test of her responsibility and of his exemption." So also in Maine: *Ferguson v. Brooks*, 67 Me. 251.

The reason of the common law rule is, that the unity of the marriage state rendered the wife incapable of being sued without her husband—and not that, in contemplation of law, he is guilty: *Kowing v. Manly*, 49 N.Y. 198, 201. His liability continues only so long as the marriage relation exists: *Id.*; and in case of his death, the action would survive against her: *Suamas v. Brewin*, 52 Ind. 510.

**THE HUSBAND'S RESPONSIBILITY CRIMINALLY.**—The protection of the law is also extended to exempt a *feme covert* from a criminal prosecution for acts which she has done by reason of her husband's coercion. In *Hensley v. State*, 52 Ala. 10, it is laid down that "An offense, not *malum in se*, committed by a married woman in the presence and with the knowledge of her husband, is presumed to have been committed by his authority, and he is punishable by indictment for it, if it be an indictable offense"—a case in which the husband was indicted, under the act prohibiting the sale of spirituous liquors without a license, for a sale made by his wife in his presence. In *Mulvey v. State*, 43 Ala. 316, an indictment for a similar offense, it was held that the fact that the wife owned and kept the store where the sale of the liquor was made, and that the husband had no interest in it and did not sell the liquor, did not excuse him, it being clearly shown that the sale was made in his presence and by his direction. So, also, *Commonwealth v. Barry*, 115 Mass. 146; *Commonwealth v. Eagan*, 103 Id. 71; *Uhl v. Commonwealth*, 6 Gratt. 706; *State v. Williams*, 65 N. C. 400. The presumption of coercion also arises, in cases of joint offenses by the husband and wife: *State v. Potter*, 42 Vt. 495.

This presumption of coercion, however, "may be rebutted by the circumstances appearing in evidence and showing that, in fact, the wife acted without constraint:" *State v. Williams*, 65 N. C. 400. "The presumption of law that the wife committed an offense by the coercion of her husband when he was present, is very slight, and may be rebutted by very slight circumstances:" *State v. Cleaves*, 59 Me. 302. It may be shown that she was the instigator and more active party: *City Council v. Van Roven*, 2 McCord, 465; 1 Russell on Crimes, 33 *et seq.* Or it may be established that the husband was incapable of coercing the wife, as in the case of a cripple confined in bed: *Regina v. Pollard*, 8 Car. & P. 553. Or the presumption may be rebutted by the nature of the offense: *State v. Williams*, *supra*. If it appear that she committed the offense in his absence, though by his direction, her coverture will be no defense: *Commonwealth v. Munsey*, 112 Mass. 287; *Commonwealth v. Gannon*, 97 Mass. 547; *State v. Potter*, *supra*; and she alone may be prosecuted: *Commonwealth v. Feeney*, 13 Allen, 560.

A married woman may be indicted alone for her criminal acts: *State v. Haines*, 35 N. H. 207; *Commonwealth v. Eagan*, *supra*, and *State v. Williams*, *supra*; and it is not necessary to negative the coercion: *State v. Nelson*, 29 Me. 329. Under the Arkansas statutes, if a wife commits crime of any degree, under the threat, command or coercion of her husband, she shall not be found guilty, but such coercion must be made to appear and will not be presumed merely from the husband's presence: *Freel v. The State*, 21 Ark. 212; *Edwards v. The State*, 27 Id. 493.

An exception to the general rule of the wife's exemption on the ground of coercion, has been made in regard to certain crimes which from their malignity render it improbable that the wife would be constrained by her husband without the separate operation of her own will in their commission, and in regard to those crimes in which women are supposed peculiarly to participate: 1 Bishop on Criminal Law, sec. 361. To what cases this exception exactly applies has not been definitely settled. The books generally

recognize treason as within its provisions: *Somerset's Case*, 1 State Trials, 28, 29; so also, murder, 4 Bl. Com. 29; 1 Russell on Crimes, 33; and according to 1 Russell on Crimes, 33, robbery. Of those offenses in which a woman is supposed to peculiarly participate is the keeping of a bawdy house: *Commonwealth v. Wood*, 97 Mass. 225; *State v. Bentz*, 11 Mo. 27; 4 Bl. Com. 29. The distinction made in the principal case between offenses *mala in se* and *mala prohibita* is, as Schouler in his *Domestic Relations*, says, p. 102, "variable and somewhat shadowy, the line seems to be drawn more wisely between such heinous crimes as murder and manslaughter, and the lighter offenses." And Wharton on Criminal Law, vol. 1, sec. 72, lays down: "It may be questioned, however, whether the coercion and presence of the husband is not now a good defense in all cases, and whether the exception taken as to the higher grades of felonies still obtains, and the better opinion now is not to recognize such an exception."

Upon the whole, however, the responsibility of a married woman for her criminal acts may be stated, as laid down in a learned and exhaustive review of the cases upon this subject, in a note to the principal case reported by Bennett and Heard, in volume one of their *Leading Criminal Cases*, p. 81: 1. There is no objection in law to an indictment against the wife alone, charging her directly with the offense; 2. There is no objection in law to an indictment charging a husband and wife jointly with the commission of an offense; 3. If upon the trial of the wife alone, or jointly with her husband, it appear in evidence that the husband was actually present when the wife committed the act, his coercion will, with some exceptions, be presumed, and the wife should be acquitted.

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## EMERSON v. BRIGHAM.

[10 Mass. 197.]

**DECEIT ON SALE.**—An action for deceit in a sale, whether of provisions or other articles, can only be maintained where a willful, false affirmation or representation is proved, or is necessarily presumed from the circumstances attending the transaction, and from the situation of the parties.

Action of deceit, submitted upon the following agreed statement of facts: The plaintiffs, merchants of Bath, in the county of Lincoln, purchased of the defendants, merchants residing in Boston, twenty-five barrels of beef, branded "Falmouth, Mass., Cargo No. 3 Beef, S. Bird, D. Insp.," and paid therefor the sum of six dollars per barrel, being the full price of good and wholesome beef of that quality. The plaintiffs transported the same from Boston to Bath, and exported four barrels to Madeira, being ignorant of its state and condition, and would have exported the whole had not one of the barrels been burst in landing, and the unfitness of the beef for use been discovered. On inspection at Bath, twenty-one barrels were found to have been packed without sufficient salt and pickle, and were not packed, in any respect, save in external appearance, accord-

ing to the brand. Of this the defendants were given immediate notice. The four barrels sent to Madeira were found to be bad and unwholesome, and wholly lost to the plaintiffs on that account. The defendants were agents for the owners in making the sale, but did not disclose that fact to the plaintiffs, and a promissory note in payment for the beef was given to the defendants in their own name. At the time of the sale and delivery, the defendants did not know that the beef was bad and unwholesome, and not packed according to law.

*Mellen*, for the plaintiffs, relied upon 8 Bl. Com. 165.

*Orr*, *contra*.

By Court, SEWALL, J. The rule has always been, I believe, that an action of deceit, or an action on the case for a deceit, in a bargain or trade, is maintainable only where the deception complained of has been intentional on the part of the seller; and it must also appear that the party purchasing had been actually deceived, and had sustained thereby a loss or damage. There is, then, an injury, for which the law affords a remedy: Com. Dig. tit. Action upon the case for a deceit: A. 8.

In applying this rule, there has been some diversity of opinions as to the cases within it. The rule has not been varied; but the decisions have not been uniform, as to the facts and circumstances from which a willful and actual deception are, in particular cases to be presumed and considered as proved. Where the sale has been accompanied with a warranty, the remedy of the purchaser is maintained upon other principles. It is for a deception, or mistake, amounting to a breach of a contract,—a contract which may be said to be collateral to the sale, by force of which the purchase is placed at the risk of the seller, as to every existing defect in the qualities of the articles sold, so far as the warranty applies: 2 East, 320, 496. The general doctrine, as it has ever since been recognized in practice, is accurately exemplified by Justice Popham in the case of the Bezow stone, as cited in Dyer: Dyer, 75, in marg. The case is reported by Croke, and was referred to by the defendants' counsel in the case at bar. Justice Popham states the rule thus: If I have an article, which is defective, whether victuals, or anything else, and I, knowing it to be defective, sell it as sound, and so represent or affirm it, an action upon the case lies for the deceit; but although it be defective, if that is unknown to me, although I represent or affirm it to be sound, yet no action lies, unless I warrant it to be sound. To be liable to an action for the deceit

incurred, the affirmation or representation of the seller is to be proved; and it must appear that he had been therein willfully and intentionally false. Now, there are cases in which a representation willfully false is to be presumed from the circumstances of the transaction and of the parties, when it is not required to be otherwise or directly proved. In this way perhaps what was cited from Blackstone's Commentaries, and relied on for the plaintiff, in the argument of the case at bar, may be reconciled with the general doctrine as I have stated it; and so likewise many decisions, which seem at first sight to indicate another rule, will be found within the general doctrine exemplified by Justice Popham, at least in the intended application of it.

Justice Blackstone, 3 Bl. Com. 164, 165, has classed the cases of deceit and breaches of express warranties in contracts for sales, under the head of implied contracts. He says it is constantly understood that the seller undertakes that the commodity he sells is his own; and in contracts for provisions, it is always implied that they are wholesome; and in a sale with warranty, the law annexes a tacit contract that, if the article be not as warranted, compensation shall be made to the buyer; and if the vendor knows his goods to be unsound, and hath used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. It is obvious that in this very general classification, the details and examples are imperfectly introduced, and with some inaccuracy. It is not implied in every sale of provisions that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems, in Justice Blackstone's opinion, to be requisite. The contrary may be, and often is, understood between the parties; and it is only when the false representation to be proved in the one case, may be presumed or taken to be proved in the other, that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved to entitle the suffering party to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions as in any other case. The difference is that in the case of provisions, the artifice is proved when a victualer sells meat as fresh to his customers at a sound price, which at the time was stale and defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the sound-

ness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade. But cases may be supposed where this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation is made, and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market, or other circumstances. Indeed, there is nothing to be inferred in a sale of provisions which may not be inferred to a like purpose in other cases, where the calling or profession of the seller, the soundness of the price, and the nature of the article sold have been made the grounds of decision.

There is an especial and invariable presumption as to the property of the vendor where the article sold was in his possession; and hence the distinction when the article is, and when it is not, in his possession. And upon the whole, it will be found, I believe, in every instance that the action as for a deceit has been maintained in those cases only where an affirmation or representation willfully false, or some artifice, has been proved, or has been taken to be proved, either directly, or because it was necessarily to be presumed from the circumstances and nature of the bargain, and the situation of the parties.

It is admitted, in the case at bar, that in the bargain between these parties there was no direct affirmation of the soundness of the article. Perhaps, however, a representation to this effect is necessarily to be implied from the nature of the bargain, it being in the common course of dealing, and for a sound price, and for an article which, to be of any value, must be understood to be sound. Thus much at least, may be safely presumed, as the understanding between these parties, that as to the kind, the quality, the state, and quantity of the meat contained in the barrels sold by the one, and purchased by the other, as barrels of merchantable beef, the seller undertook to have full faith in the brand of the deputy inspector, a public officer employed and intrusted to ascertain these facts. The seller must be understood to represent that, for aught he had known to the contrary, the brand appearing on the barrels had been truly and faithfully applied, and that no alteration or change of the article had happened within his knowledge. Now, is there any evidence, or any circumstance in this transaction from which it may be inferred that, in affirmation to this effect, the sellers would have been willfully false, or that, in an express representation, such as I

have supposed to be implied in this case, they would have been guilty of an artifice? They would have been chargeable to that extent, if, at the time of the sale, they had any knowledge of the bad state of the barrels, such as it proved to be, or had any special reason to suspect that the beef in them had not been properly cured, was without sufficient salt, was already in a putrid state or becoming putrid, or in short, if they then knew, or actually suspected, that in this instance the inspector had been false, ignorant or depraved. With evidence to that effect this case would be within the rule, and the plaintiffs entitled to this remedy for the deception which they had undoubtedly suffered, and from which a loss and damage have ensued. But on this point the evidence fails. Indeed, it is admitted that the defendants had no knowledge, at the time of the sale, of the unsuitable quality and state of the beef, or of the barrels containing it; or that it had not been packed as the law requires.

In this state of the evidence and of the case, the result is in favor of the defendants. Against them the plaintiffs have no remedy for the loss and damage sustained by a deception which has not happened, or been effected by any false representation or artifice chargeable to the defendants; and they took upon them no extraordinary risk in this particular by any warranty accompanying the sale.

The plaintiffs are to become nonsuited, and judgment is to be entered for the defendants to recover their costs.

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A purchaser who suffers damage by reason of a defect of title, or quality in an article bought, may have indemnification or a remedy either *ex contractu* or *ex delicto*; that is, he may proceed on a warranty, express or implied, or he may, in case of fraud in the vendor, have an action founded in tort for the damages. Little may be here said as to an express warranty. It is proposed only to refer to the remedy on a warranty implied, or by way of tort where there has been fraud on the part of the vendor.

**IMPLIED WARRANTY.**—The doctrine of implied warranty is very much restricted by the common law, and in this it differs from the Roman law, which implied a warranty of title, of soundness and fitness, by the mere fact of sale. This doctrine is found somewhat modified in South Carolina, as appears from *Tward v. Shoolbred*, 1 Am. Dec. 620; *Whitefield v. McLeod*, Id. 650; *Houston v. Gilbert*, 5 Am. Dec. 542; and it is followed in Louisiana, as might be expected: See 1 Parsons on Contr. 584. The doctrine is thus stated in the Louisiana Civil Code, art. 1764: "There are things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect." And again, by Art. 2541, it is provided that

"whether the defect in the thing sold be such as to render it useless, and altogether unsuited to its purpose, or whether it be such as merely to diminish the value, the buyer may limit his demand to the reduction of the price."

It was formerly held in the common law that a warranty of title would not be implied on the sale of a chattel: *Howland v. Doyle*, 5 R. I. 36; but this doctrine is discarded in this country and in England: *Eicholz v. Bannister*, 17 C. B. N. S. 708; *Defreeze v. Trumper*, 3 Am. Dec. 329; *Hoe v. Sanborn*, 21 N.Y. 552; *Charnley v. Dulles*, 8 Watts and S. 5. But an exception is made where the seller is out of possession, or where he merely sells such right as he has: *Scranton v. Clark*, 39 N.Y. 139; *Norton v. Hooten*, 17 Ind. 365; 1 Parsons on Contr. 574, and cases cited. But in regard to the character or quality of goods, our law, in the absence of an express warranty, does not imply one; the stringent rule of *caveat emptor* then applies. Whether this rule, on the whole, is the best and the most practicable, may be questioned. Many able jurists have questioned its morality and justice; but it is claimed by those who uphold its wisdom that it more closely adheres to the practical possibilities of life than any other; and in this instance the common law manifests its sound wisdom and practical character. However this may be, it is certain that no doctrine is so well settled in our law as that a mere sale for a full price, when no representation is made, amounting to a warranty, will not necessarily imply a warranty of soundness, except in cases of provisions sold for immediate family use, and in the case of the manufacture of an article for a specific use.

The cases are numerous holding that the mere expression of an opinion of the character or quality of goods sold will not amount to a warranty; a seller being permitted to exaggerate, puff or enhance the quality as much as he pleases, thus adopting the maxim of the civil law, *simplex commendatio non obligat*. A reference to the following cases will show how this doctrine has been followed: *McFarland v. Newman*, 9 Watts, 56; *Wetherill v. Neilson*, 8 Harris, 448; *Fraley v. Bispham*, 10 Pa. St. 320; *Carson v. Baillie*, 19 Pa. St. 375; *Eagan v. Call*, 34 Id. 236; *Sands v. Taylor*, 4 Am. Dec. 374; *Hart v. Wright*, 17 Wend. 287; *Salisbury v. Stainer*, 19 Id. 159; *Johnston v. Cope*, 5 Am. Dec. 423; *Hyatt v. Boyle*, 5 Gill & J. 119; *Rice v. Forsyth*, 41 Md. 339; *Conner v. Henderson*, 15 Mass. 320; *Lamb v. Crafts*, 12 Met. 353; *Howard v. Emerson*, 40 Mass. 320; *Sweet v. Shumway*, 102 Id. 365; *Reed v. Hastings*, 61 Ill. 266; *Adams v. Johnson*, 15 Id. 346. In *Matthews v. Harston*, 3 Pittsb. 86, there is an able review of the doctrine of the common law, and an examination of many cases on this head. The line, however, which separates a case of mere puffing and commendation from a case where there is an affirmation of a matter of fact which will constitute a warranty is indeed sometimes indefinite; and then a perplexing question arises as to the meaning or intention of the seller. Then comes in the province of the jury; when it must be determined as a matter of fact whether a warranty was intended. It is well established that a warranty may be made not alone by writing or by any set form of words, but in the affirmation of a fact which induces the purchase, and on which the seller relies: *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Murphy v. Gay*, 37 Mo. 536; *Weimer v. Clement*, 37 Pa. St.; *Bond v. Clark*, 35 Vt. 580; *Hahn v. Doolittle*, 18 Wis. 197; *Polhemus v. Heiman*, 45 Cal. 578; *Chapman v. Murch*, 19 Johns. 290.

The intention then is a question of fact for the jury to be inferred from the nature of the sale, and the circumstances of the particular case: *Benjamin on Sales*, 568; *Morrill v. Wallace*, 9 N. H. 111; *Foster v. Caldwell*, 18 Vt. 176. Whether a statement made by the seller of a cow that "she is all right" is a warranty of her soundness, was held to be a question for a jury in *Tuttle v.*

*Brown*, 4 Gray, 457. In *Stroud v. Pierce*, 6 Allen, 413, it appeared that the vendor of a pianoforte affirmed that it was well made and would stand up to concert pitch, and that this affirmation was untrue. The court ruled that this was a representation of fact, and being found to be false, the purchaser was entitled to recover for breach of it. The vendor claimed that it should be left to the jury to find whether the above language was intended to affirm the fact or express an opinion. Chapman, J. said: "The intent of the party is immaterial. The legal proposition stated by the judge was correct."

Now while this doctrine is held, it is, however, lately the tendency of courts to construe a representation very strictly against the vendor, and to hold him to a warranty when his words strictly imply one, and may properly be taken in this sense by the buyer; he will not be permitted in this case to disclaim an intention to warrant, any more than he would if he had expressly put the warranty in writing: *Stone v. Denny*, 4 Met. 151; *Smith v. Justice*, 13 Wis. 600; *Robinson v. Harvey*, 82 Ill. 58. One of the best considered cases applying this doctrine is the case of *Hawkins v. Pemberton*, 51 N. Y. 198. The following language is used by Earl, J.: "It is not true, as sometimes stated that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." The doctrine here asserted is very important, as it exhibits the tendency of the courts of late to interpret an affirmation of fact strictly as a warranty. The case is followed in *Dowce v. Dow*, 64 N. Y. 411, and in *Van Wyck v. Allen*, 69 Id. 67.

**ARTICLES FOR A SPECIFIC USE.**—An exception to the rule that a warranty will not be implied as to quality or soundness is made in case of an executory contract to manufacture an article for a specific use. It has been maintained that in this case there is not merely a warranty, but when the contract is executory, an engagement to produce an article adapted to a certain use or purpose, is in the nature of a contract, and is to be understood as such. The ground of this distinction is thus admirably stated by Lord Abinger in *Chantrv. Hopkins*, 4 M. & W. 399, where he says: "A good deal of confusion has arisen from the unfortunate use of the word warranty. Two things have been confounded together. A warranty is an express or an implied statement of something which the party undertakes shall be part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty, and a breach of such contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as if a man offers to buy pease of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him pease; the contract is to sell pease, and if he sells him anything else in their stead, it is a non-performance of it."

In 1 *Parsons on Contr.* 586, it is stated that "if a thing be ordered of the

manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose;" and for this proposition reference is made to *Beals v. Olmstead*, 24 Vt. 114; *Jones v. Bright*, 5 Bing. 533, a leading English case. See, carrying out this view, *Rodgers v. Niles*, 11 Ohio St. 48; *Byers v. Chapin*, 28 Id. 300; *Mason v. Chappell*, 15 Gratt. 572; *Sims v. Howells*, 49 Ga. 620; *Beers v. Williams*, 16 Ill. 69; *Union Hide Co. v. Reissig*, 48 Id. 75; *Kimball Mfg Co. v. Vroman*, 35 Mich. 310; *Page v. Ford*, 12 Ind. 46; *Hoe v. Sanborn*, 21 N. Y. 552; *Dounce v. Dow*, 64 N. Y. 411; *Brenton v. Davis*, 8 Blackf. 317; *Bird v. Mayer*, 8 Wis. 362; *Fisk v. Tank*, 12 Id. 103; *Parsons v. Sexton*, 4 C. B. 899; *Mallan v. Radclif*, 17 C. B. N. S. 588. Illustrations of this doctrine appear where a man says to another: "Sell me a horse fit to carry me," and the person sells a horse which he knows to be unfit to ride. He will thus be liable as on a contract: *Keates v. Cadogan*, 10 C. B. 591, per Maule, J. So a contract to "furnish a steam boiler suitable to the engine," and a delivery under such contract of a boiler, amount to a warranty that it is suitable for the purpose proposed: *Street v. Chapman*, 29 Ind. 142. So in the sale of an engine to be used by the purchaser in his manufactory with a cut-off invented and patented by G., which the sellers were permitted to attach to the engine by such patentee, and which it is represented would be of great value to the purchaser, there is an implied warranty that the purchaser shall have a right to use the cut-off in connection with the engine: *Pacific Works v. Newhall*, 34 Conn. 67. A distinction is made as an exception to this rule in the case where a specific article is ordered, and nothing said or stipulated as to its adaptation or use. Here there is nothing to distinguish the case from the ordinary one of a man who has had the misfortune to order a chattel on the supposition that it will answer a particular purpose, which he finds it will not: *Chanter v. Hopkins*, 4 M. & W. 399.

In *Mason v. Chappell*, 15 Gratt. 572, it was held that if the purchaser had ordered a "fertilizer" capable of producing certain effects, or fit for a particular use, the vendor would have been responsible for the fitness of the article; but that an order for "Chappell's fertilizer," accompanied by a statement that it was to be used as manure, did not render the vendor responsible for its fitness for that purpose, although he was the inventor, and had advertised it as having the very qualities which experience showed that it did not possess. The same principle is applied in *Bond v. Clark*, 35 Vt. 577, and in the English case of *Ollivant v. Bayley*, 5 Q. B. 288, in relation to sales of patented articles. The doctrine of these cases is thus stated: "If the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose." 1 Parsons on Contr. 588.

Where a person is not a manufacturer of the article sold, but is merely a dealer, or merchant, he is not held to impliedly warrant its fitness or soundness. This is well illustrated in *Dounce v. Dow*, 64 N. Y. 411. Here there were ordered from a dealer, who was not a manufacturer, ten tons of "XX pipe iron," to be used for a certain purpose. The iron was supplied, and used without testing; but afterwards was found to be unfit for the required use. In an action upon a note given for the purchase-money it was held that there was merely a warranty of the character of the iron, that it should be of the particular brand, and that it was not enough that the dealer should know the purpose for which it was required. See, holding the same doctrine: *Bartlett v. Hoppock*, 34 N. Y. 118; *Hart v. Wright*, 18 Wend. 449; *Bragg v. Morrill*, 49 Vt. 45; *Tilton Co. v. Tisdale*, 48 Id. 83. In some cases, perhaps too much stress has been put on the fact that the vendor was not a manufacturer, and on this account was exempted from liability for latent defects, and unfitness

of the material. But where there is a distinct contract to furnish goods of a particular kind and quality and adapted to a certain purpose, a party will be equally responsible as if he were a manufacturer: *Brown v. Edgington*, 3 M. & G. 371. In fact, in this case the rights and liabilities of the parties are wholly based on contract, and not so much on warranty as an incident of the contract.

**ARTICLES USED AS PROVISIONS.**—In opposition to the general rule that a warranty will not be implied, is the case of the sale of provisions for immediate domestic use: 3 Bl. Com. 166; *Van Bracklin v. Fonda*, 12 Johns. 468; *Moss v. Mead*, 1 Denio, 378; *Moore v. McKinlay*, 5 Cal. 471; *Getty v. Roundtree*, 2 Chandler, 28. But unless the vendor is a dealer in such provisions, and they are bought for immediate family consumption, it is held there is no implied warranty of soundness: *Burnby v. Bollet*, 16 M. & W. 644; *Bigge v. Parkinson*, 7 H. & N. 954; *Hyatt v. Boyle*, 5 Gill & J. 119; *Wright v. Hart*, 18 Wend. 449; *Ryder v. Neüge*, 21 Minn. 70. In *Winsor v. Lombard*, 18 Pick. 61, Shaw, C. J., thus states the rule: "It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by Mr. Justice Sewall in *Emerson v. Brigham*, 10 Mass. 197. In a case of provisions it will be readily presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor."

In the sale of molasses in barrels at the market price, to a grocer to retail, where the quality of molasses is not examined (the barrels being present at the sale), there is no implied warranty that the molasses is fit for the purpose for which it is purchased: *Humphreys v. Comline*, 8 Blackf. 516.

**FRAUD.**—Where there is no liability *ex contractu*, a vendor may evidently be liable on the ground of *tort*. A transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract; while fraud or fraudulent representations have no element of contract in them, but are essentially a *tort*: *Ross v. Hurley*, 39 Ind. 77; *Pierce v. Carey*, 37 Wis. 232. Parsons (1 Contr. 578) says: "It becomes, therefore, important to know what the law means by fraud in this respect, and what it recognizes as such fraud as will prevent the application of the general rule. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought perhaps on moral grounds to avoid the transaction. But this *moral* fraud has not yet grown into a *legal* fraud. In cases of this kind there may be circumstances which cause this moral fraud to be a legal fraud, and give the buyer his action on the implied warranty, or on the deceit. And if the seller be not silent, but produce the sale by means of false representations, then the rule of *caveat emptor* does not apply, and the seller is answerable for his fraud."

According to this statement there would seem to be no liability *ex delicto* where a party is silent, knowing of a defect or vice in a chattel which he sells. This is hardly a correct statement of the doctrine as held now by some of our courts. See 1 Story on Contracts, sec. 648, where he shows when one is

liable for a *suppressio veri* on the ground of fraud, making the distinction between a concealment of extrinsic and intrinsic matters. There is a strong and decided tendency evinced of late to hold a party liable for a *suppressio veri*, as for a *suggestio falsi*, and in this respect we are approaching the rule of the civil law. The obligation resting on a seller by that law is well expressed by Domat, book 1, tit. 1, where he says that "there is no sort of covenant in which it is not understood that the one party is bound to deal honestly and fairly by the other, and to do whatever equity may demand, as well as in the manner of expressing himself in the covenant as in the performance of what is covenanted, and of all the consequences of it."

It is true that judicial equity in this respect is not as broad as the requirements of strict ethics: 1 Story Eq. Juris. 194; 2 Kent Com. 484. But the doctrine is however maintained in our law that silence will, on some occasions, be tantamount to fraud; as where a person selling an article knows of a latent defect or unsoundness, which if disclosed would prevent the sale, he will be held liable as for a fraud; for the suppression of truth is often equivalent to the allegation of what is false, and there are concealments which amount to actual fraud: *Hill v. Gray*, 1 Starkie, 434; *Laidlaw v. Organ*, 2 Wheat. 178; *Ferebee v. Gordon*, 13 Ired. 350; *Bean v. Herrick*, 12 Ma. 262; *Barnard v. Duncan*, 38 Mo. 170; *Dean v. Morey*, 33 Iowa, 120; *Brown v. Gray*, 6 Jones N. C. 103. This rule is specially applied where the defect is known to the vendor, but is not discoverable by the vendee by the use of ordinary diligence: *Turner v. Huggins*, 14 Ark. 21; *Singleton v. Kennedy*, 9 B. Mon. 222.

The language of Kent is that "if there be an intentional concealment or suppression of material facts in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract:" 2 Com. 482. And carrying out this view see: *Paddock v. Strobbridge*, 29 Vt. 470; *Hanson v. Edgerly*, 9 Foster, 343; *Eagan v. Call*, 34 Pa. St. 236; *Prentiss v. Russ*, 16 Me. 30; *Hobbs v. Parker*, 31 Id. 143; *Kintzing v. McElrath*, 5 Pa. St. 467; *Maynard v. Maynard*, 49 Vt. 297; *Horsfall v. Thomas*, 1 H. & C. 90. The rule is more strictly implied where there is a special confidence reposed in the vendor; or where there are such relations existing between the parties as to justify the buyer in reposing a confidence: *Van Arsdale v. Howard*, 5 Ala. 596; *Truebody v. Jacobson*, 2 Cal. 269.

FRAUDULENT REPRESENTATIONS.—The cases in reference to fraudulent representations in the sale of chattels show a want of certainty and harmony. It is not easy to lay down in definite rules what representations may be considered fraudulent, and what may be taken as mere commendation, puffing, or the expression of opinion. The doctrine on which they all agree is that a misrepresentation as to the quality or character of the goods, or any false affirmation of a fact which has been the main inducement to the purchase, will constitute fraud so as to vitiate the contract, or give a right of action for deceit: *Phipps v. Buckman*, 30 Pa. St. 401; *Smith v. Richards*, 13 Peters, 26, a valuable case on this point; *Lord v. Goddard*, 13 How. 198; *King v. Eagle Mills*, 10 Allen, 548; *Thayer v. Turner*, 8 Met. 500; *Hazard v. Irwin*, 18 Pick. 95; *Cornelius v. Molloy*, 7 Pa. St. 293; *Blythe v. Speke*, 23 Tex. 429; *Gailing v. Newell*, 12 Ind. 118; *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580, 587. But the mere fact that the vendor of personal property places an over-valuation upon it by which the buyer is led to give more than it proves to be worth, does not entitle the latter to relief: *Uhler v. Semple*, 5 C. E. Green, 288.

In cases of this kind, proof of the *scienter*, that there was an intent to mislead and deceive, is essential, as in other cases where the action is founded on fraud: *Hadley v. Clinton*, 13 Ohio St. 502; *Bigler v. Flickinger*, 55 Pa. St. 279; *Cooper v. Lovering*, 106 Mass. 79; *Beach v. Bemis*, 107 Id. 499. But where a person positively affirms the truth of something, of which he is ignorant, which is not a mere assertion or expression of opinion or belief, and it turns out to be false, he is nevertheless liable as for a fraud: *Bennett v. Judson*, 21 N.Y. 238; *Monroe v. Pritchett*, 16 Ala. 785; *Hazard v. Irwin*, 18 Pick. 95.

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## LENT v. PADELFORD.

[10 Mass. 230.]

**PLEADING WRITTEN INSTRUMENT.**—In an action upon a written contract, it is not necessary to set forth in the declaration the precise words of the contract; it is sufficient to declare according to their legal import and effect.

**PLEADING PROMISE.**—Where the declaration alleges a promise by the defendant, in consideration of the performance of some act by the plaintiff, an averment of such performance on the part of the plaintiff is sufficient, without alleging a promise by him or other assent to the contract.

**PLEADING NOTICE.**—It is unnecessary to allege notice to the defendant of matters equally within the knowledge of the plaintiff and defendant.

**MOTION** for a new trial, and in arrest of judgment. The plaintiffs alleged that a certain execution in their favor had issued against one Barney; that the defendant promised the plaintiffs, in writing, if they would delay the service of the execution until the first Monday of June then next, and in consideration of value received by the defendant from Barney, that the said Barney should be ready, at a certain tavern, to pay the amount of the execution, or surrender himself to any officer having the writ; and that, in case Barney were not ready, the defendant promised to pay the same himself. The defendant reserved the right to go after Barney, if he should be out of the state, and deliver him at the place mentioned on the fourth Monday in June, thereby intending to exonerate himself from his obligation. Plaintiffs further alleged that, confiding in the defendant's promise, the service of the execution was delayed, etc., but that Barney was not ready at, etc., nor did the defendant deliver him on the fourth Monday, etc.; and that defendant has never in any manner discharged said execution, etc.

Plea, the general issue, and joinder; and in bar that Barney went to reside in New York, and had in March, prior to the said June, set out to surrender himself at the tavern, but was taken sick, and confined for so long a time that he could not arrive at

the tavern on, etc.; but that as soon as he possibly could, on the day succeeding the fourth Monday, he arrived at the tavern, and offered to surrender himself to the sheriff holding the execution. The plaintiffs replied, traversing the sickness, on which issue was joined. On the trial the plaintiffs produced against defendant's objection, the written promise of the defendant, as follows: "Whereas there is now an execution in the hands of, etc., in favor of James W. Lent and William H. Folger against Joseph Barney for the sum of, etc., and it cannot now be paid by the said Barney; therefore, if said execution can be delayed till the first Monday of June next, and in consideration of value received of said Barney, I hereby agree and promise that the said Barney shall make his appearance, and be ready at, etc., either to pay said execution, or to surrender himself to any officer who may have the same at that time, or I will pay the same with the interest from this time, to said Lent and Folger. Savoy, February 28, 1809. And, further I reserve to myself the right to go after said Barney, if he goes out of the state, and deliver him at the place above mentioned, on the fourth Monday of June aforesaid. Manley Padelford." It was proved that Barney did not appear at the place agreed upon until the day after the fourth Monday, when he arrived and offered to surrender himself to the officer who was there with an execution then in full force. It was admitted that the officer refused to arrest Barney, pursuant to instructions from the plaintiffs' agent. It was also proved, by parol evidence, that the officer had delayed arresting the debtor by reason of the plaintiffs' orders, which they had given upon receiving the writing declared upon.

The jury were charged that the contract was sufficient to support the action, and that, if the defendant had not proved the plea in bar, the verdict should be for the plaintiffs for the debt and costs upon the execution, and interest thereon from the commencement of the action. Verdict accordingly.

The motions in arrest and for a new trial were then made upon grounds which appear from the opinion.

*Dewey and Noble*, for the defendant, in support of the motion for a new trial cited: *Cooke v. Oxley*, 3 T. R. 653; *Champion v. Plumer*, 4 Bos. & P. 252; *Wain v. Warblers*, 5 East, 10; *Sears v. Brink*, 3 John. 210 [3 Am. Dec. 475]; *Bailey v. Ogden*, Id. 399 [3 Am. Dec. 509]. And in arrest of judgment cited: *Birks v. Trippel*, 1 Saund. 32; *Bach v. Owen*, 5 T. R. 409.

*Hulbert, contra.*

By Court, JACKSON, J. The court have heard both these motions together, for the convenience of the parties, and to prevent delay.

The first point to be considered, in the motion for a new trial, is the supposed variance between the declaration and the writing produced in evidence. It is never necessary to declare in the precise words of a written promise. It is always allowable, and often necessary, to declare according to their legal effect and import. In the present case, we have no doubt that the promises contained in the writing were made to the plaintiffs. They are the only persons interested in the subject of the promises, which do not purport to be made to any other person; and the defendant expressly promises, in the event which has happened, to pay the money to the plaintiffs. It is like the case of a common promissory note. The words of the note are, "for value received I promise to pay to A. B.;" but in the declaration upon such a note it is always alleged that the defendant promised A. B. to pay him.

As to the other supposed variance, we are equally satisfied that the declaration comports with the legal effect of the writing. The expression, "if the execution can be delayed," as introduced in this paper, is equivalent to saying, "if you will delay it," or, "in consideration that you will delay it."

The next ground of the motion for a new trial is the supposed misdirection of the judge in instructing the jury that the contract was sufficient in law to support the action. We are all satisfied that this direction was right. We have already said that the contract was made with the plaintiffs; and, indeed, it further appears, from the report, that it was made by the express authority of their agent. Even if the agent had no previous authority to make this contract for the plaintiffs, yet, if the agent proceeds immediately to execute the contract, in any part beneficial to the defendant, or prejudicial to the plaintiffs, and if the plaintiffs afterwards assent to it, and go on further in performance of the contract, it shall bind both parties. As to the consideration, there is no necessity of deciding, on this occasion, whether it must always be expressed in the writing, according to the opinion in the case of *Wain v. Warblers*, because this power does sufficiently express the consideration. It does not appear whether it was of any benefit to the defendant, but it was a prejudice to the plaintiff, viz., suspending the service of their execution from February to June. It cannot be supposed that, in such a case, the writing should

show that the whole consideration was executed on the part of the plaintiffs. That is obviously impossible in every case where the consideration is a forbearance until a future day. But it is said that it does not appear, in this writing, that the plaintiffs agreed to forbear their remedy until June. We know of no rule that requires the contract of the plaintiffs in this case to be contained in the same paper which contains that of the defendant, nor even that the former should be reduced to writing at all. The statute of frauds, in its most strict construction, would require only the motive, cause or consideration, of the promise to be expressed, so that the court could judge of its sufficiency; not that the same paper should also contain the evidence of the performance, delivery, or receipt of the thing upon which the promise is founded. It is enough if the court can decide, upon inspection of the paper, that the consideration is sufficient in law; it is a question for the jury, whether that consideration has been in fact performed or received. It appears in this case that the plaintiffs, by their agent, did authorize and assent to this contract, and that they have performed it on their part. As this agreement of the plaintiffs is not required to be made in writing, it may, of course, be proved by parol testimony.

As to the amount of damages, we are satisfied that the jury were rightly instructed by the judge. This is not merely an agreement by the defendant to do a collateral thing; nor is the money to be paid by way of penalty for a breach of the contract. We do not consider the damages thus liquidated by the parties to be unreasonable in the event which was contemplated, and which has since occurred. The defendant has agreed, in a certain event, to pay this sum; and we have no power in this case to alter his agreement.

There are two grounds of the motion in arrest of judgment: The first is, that no sufficient consideration for the defendant's promise is set forth in the declaration: The declaration states that in consideration that the plaintiffs would delay the service of their execution, the defendant promised; and then it is averred that the plaintiffs did delay the service accordingly. This appears to us sufficient. It is the usual mode of declaring in such case in the books of entries. This manner of stating the consideration and the contract is not confined to cases of forbearance. It is not uncommon, in the case of goods sold, to declare, that in consideration that the plaintiff would sell and deliver to the defendant such goods, the latter promised to pay a certain price, and then to aver that he did sell and deliver

them accordingly. So, in consideration that the plaintiff would do any other specific thing, and then aver the performance, without alleging that the plaintiff had promised to do it. This is not one of the cases in which it is necessary to state in the declaration mutual promises as the consideration of each other.

The other ground of the motion in arrest of judgment at first excited the most doubt in the minds of the court. It is the want of averring notice to the defendant that the said Barney did not appear at the time and place prescribed, and a special request to the defendant to pay the money. But, upon further consideration, we are all satisfied that the declaration is in this respect sufficient. The general rule is perfectly well settled. When the matter alleged lies peculiarly in the knowledge of the plaintiff, he must aver that the defendant had notice; but when it lies equally in the knowledge of the defendant, such averment is unnecessary. The case at bar comes within the latter branch of the rule. There was no act to be done exclusively by the plaintiffs. It may even be said that the matter, by which the defendant was to be discharged, was an act to be performed by himself. He promises that Barney shall make his appearance; he undertakes to have him at a day and place certain, and he must know whether he has done so. But, without going to this length, it is sufficient if the act were to be done by a stranger. The defendant had as good means of information as the plaintiffs, and he was bound to take notice whether Barney made his appearance at the time and place appointed. It was not necessary, then, for the plaintiffs to give him formal notice of the fact; and, of course, it is not necessary to aver such notice in the declaration.

As to the want of averring a special request, we should yield with difficulty to such an objection, after a verdict on the merits of the case. The only use of a special request is to avoid vexatious suits, by giving to the defendant an opportunity of paying an undisputed demand. It is apparent, in the case before us, that it would have been a fruitless ceremony. We are not, however, satisfied that such a request was required by the strictest rules of law. The defendant may be considered as agreeing to do, or cause to be done, one of two things. When he knew that the one was not performed, he became immediately liable to perform the other. The payment of the money became a present duty, as if there had been no alternative in the original contract. In such a case, the general averment of *licet sapius requisitus* is sufficient.

Judgment on the verdict.

## TAUNTON TURNPIKE CORPORATION v. WHITING.

[10 Mass. 327.]

**ASSUMPSIT FOR ASSESSMENTS.**—Where one subscribed for a certain number of shares in a turnpike and promised to pay, on demand, to the agent of the corporation, all assessments levied thereon, it was held that the corporation could bring assumpsit to recover the amount of such assessments.

**ACTION** to recover the amount of certain assessments levied upon four shares of the Taunton and South Boston Turnpike Corporation, the property of the defendant, for which he had subscribed, and the assessments upon which he had agreed to pay. The case appears from the opinion. Verdict for the plaintiffs, subject to the opinion of this court.

*Whitman*, for the defendant, contended that the action did not lie, and cited *Andover Turnpike Corporation v. Gould*, 6 Mass. 10 [4 Am. Dec. 80]; *Andover Turnpike Corporation v. Hay*, 7 Mass. 102; *New Bedford Turnpike v. Adams*, 8 Id. 138 [5 Am. Dec. 81].

*Tillinghast*, *contra*.

**SEWALL, J.** In this action the special promise of the defendant is alleged to this effect, that he will take four shares in the turnpike road, then about to be located and made, and will pay on demand, to J. G., or order, all assessments that may at any time be made by the corporation for the purpose of laying out the road, making and keeping the same in repair, and for damages to individuals for land, etc., provided said road is laid out, etc. The plaintiffs aver a road laid out, according to this proviso, and assessments at several times, to a certain amount upon each share, for the purposes designated in the subscription paper; and actual expenditures on the road and in the purchase of lands to the amount of the assessments; also due notice to Mr. Whiting of the assessments upon his four shares. These are alleged to amount to the sum of five hundred and sixty dollars in the whole; and it is then averred that, being so indebted, he promised to pay the same accordingly, yet, though requested, he neglects so to do.

The verdict found for the plaintiffs is to be considered as establishing these averments, and also the liability of the defendant upon the allegations of the writ, if that is a legal and just implication. It has been argued, for the defendant, that, in point of form, this is an incorrect declaration; that he is liable, if at all, according to the tenor of the supposed special

promise, and not upon any implied promise arising on his agreement and the circumstances connected with it, such as the laying out of the road, the assessments, expenditures, etc. This objection might be more suitably urged on a motion in arrest of judgment; but in this stage of the cause it may be proper to observe upon it that this form of declaring is not unusual, and is very convenient and technical where the liability of the party, holden by a special agreement or contract, depends in part only upon the express promise, and when it is necessary to aver and prove either subsequent events or something done and performed by the plaintiff to entitle him to his action on the agreement: Chitty on Pleading, 334.

The objections principally relied on for the defendants, and upon which his motion for a new trial is grounded, are to the evidence admitted, and the construction given to it in the directions under which the jury proceeded in finding their verdict.

According to the report before us, the jury have found the verdict upon evidence derived from a copy only of the writing subscribed by the defendant, or what may be called testimony of the contents of the original writing. The admission of this evidence was objected to at the trial, and the objection was overruled upon testimony of the existence of the writing, and of the production of it by the defendant himself at the first meeting of the corporation under their charter, when the defendant was appointed their clerk. The witness then copied the writing, upon an assurance, expressed by the defendant himself, that the writing was so framed as to make the subscribers personally liable for all assessments upon the shares subscribed, and the defendant, as clerk, then received the original, and having continued clerk until the year 1810, when the witness succeeded him, and received of him all the official papers, which he acknowledged to be in his possession. The original writing subscribed, among others, with the defendant's name, was then missing, and he was notified of it and required to produce it. The defendant then declared that the writing had been lost, or was mislaid. We are satisfied that upon these circumstances, proved at the trial the evidence of the contents, and of the copy taken of the original writing, was properly admitted to charge the defendant. This is not the case of a writing which, by some accident, may be under the control of the party against whom it is wanted as evidence, or where he is entitled to the possession of it. In that case, proof of the contents is to be introduced by notice to the party to produce the original. But in the case at bar the

defendant had the possession of his contract with the corporation officially, under the sanction of his oath as clerk; and no mismanagement or negligence on his part is to operate to deprive the corporation of the benefit of this writing, when to be used against him. If existing, he is still holden by the tenor of his official oath to produce it; if lost and not existing, then the evidence admitted is the best which can be produced, and the rule of law in this respect is fully complied with. Certainly against the defendant this evidence must be taken to be the best, whether by his negligence the corporation have been deprived of the original, or whether according to his own account it must be considered as lost. As to the construction of this evidence, supposing it competent, we think the jury were rightly directed, and that their conclusion upon it is sufficiently maintained. We lay no stress upon the verbal declaration made by the defendant, when he produced the writing he had formed and subscribed. If the testimony in this particular is correct, it is for the defendant to reconcile it with the defense now insisted upon by him and his counsel, this being a question of morals for his personal consideration. In this action we are called upon to enforce only the legal obligation, which must depend exclusively, we think, upon the import and effect of the written contract.

In the case of *The Worcester Turnpike Corporation v. Willard*, 5 Mass. 80 [4 Am. Dec. 39], which was cited in the argument for the plaintiffs, this court decided that a writing subscribed by the defendant, expressed as a contract to take one share, etc., and to pay all legal assessments, with a proviso as to the location of the road, was a personal engagement to pay assessments, which gave to the corporation a cumulative remedy against the subscriber, in addition to the remedy provided by the statute to enforce the payment of assessments by a sale of shares. On the other hand, in the case of *The Essex Turnpike Corporation v. Collins*, 8 Mass. 292, there is a decision of this court for the defendant, when charged upon a subscription for turnpike shares, expressed in the same words with that subscribed by Willard. But in this last decision the court were not finally determined by the tenor of the promise, but by the circumstances under which it was made. As we are not disposed to controvert the authority of these decisions, we shall, without advertng to others which have been cited, but which are not so immediately relevant to the case at bar, endeavor to place the present decision upon a footing consistent with the

cases of Willard and of Collins, and established by the principles adopted in those decisions. In both of them, a promise to pay assessments, as well as to take shares, was considered as entitling the corporation to a cumulative and personal remedy. In the case of Willard, this was enforced because he had become a proprietor in the turnpike, in consequence of this collateral promise on his part; that is, after his subscription, to which he was invited, pursuant to a vote of the corporation; and after their acceptance of his engagement, he must be understood to have received from them a certificate for the share he had subscribed; for he paid the first assessment upon it, and was therefore to be considered as having become a subscriber upon the terms proposed by his subscription.

In the case of Collins it was otherwise. After the corporation had been organized, and a part of the turnpike which was the subject of the subscription had been purchased and built, at the invitation of a person not employed by the corporation, or having no authority to engage in their behalf, Collins was induced to subscribe, upon a particular representation made to him, as to what would be the effect of his engagement, and the amount of the assessments to which he would become liable. But before this proposal, as it might be called, on the part of Collins, was accepted by the corporation, he thought fit to declare off, and he finally refused to take any certificates of shares, or to pay any assessments.

In the argument for the defendant in the case at bar, it has been attempted to show the same defects of consideration and mutuality as in Collins' case. It is urged that the writing subscribed by the defendant is expressed as an engagement to an individual not authorized by the corporation to procure subscriptions in their behalf, and that, in fact, when the writing was made and signed by the defendant, the charter of incorporation had not been accepted; there had been no meeting of the proprietors and no organization under the act; and it is argued that their subsequent assent and acceptance of this engagement, as no rights or advantages were thereby derived to Whiting, are not to have the effect of concluding him upon his subscription, which, when made, had no other operation than a proposal to become a subscriber upon the terms stated, but which, not being then accepted, it was competent for him afterwards to rescind. This defense is not, we think, justified by the state of the facts, as we consider it established by the verdict, and by the report of the evidence. Considering the direction by which

the jury were governed in finding a verdict for the plaintiffs, we must understand, as conclusively proved at the trial, that the corporation adopted and ratified the proceedings of Gilmore, and accepted the subscriptions procured by him as obtained in their behalf, and, in consequence thereof, delivered to the defendant, and the other subscribers in that writing, their certificates of shares, which the defendant, as well as the others, received of the corporation. We have, therefore, in the case at bar, besides the subscription, the subsequent ratification of the contract, not only on the part of the corporation, but on the part of the defendant, also, who, after the corporation had assented to his proposal, if in that light his subscription is to be regarded, received of them the evidence of his title to four shares, upon the terms he himself had proposed. Thus, then, the contract was completed by the mutual consent of the parties concerned. Perhaps even this is suspending the completion of the contract longer than is necessary, upon the whole state of the evidence; for it appears that, at the first meeting of the proprietors, on the ninth of August, when they accepted their charter and organized themselves under it, the defendant being one of them, Gilmore, the witness, was authorized to procure subscriptions in the form and upon the terms—this of a personal liability particularly, recommended by the defendant. And then it was that the defendant produced and delivered at the meeting, and placed with the records of the proprietors, the writing which he had formed and subscribed with others, as a compact with the corporation. Admit then that the handwriting on the paper preceded the meeting, yet the delivery and acceptance of it, which is the date of its legal operation, to the time to which the words written were to be understood to relate, was subsequent to the organization of the proprietors, and then, if not before, Gilmore, the name used in the subscription, was recognized as their agent, acting in their behalf. The law will so arrange acts, performed in one day and relating to the same subject-matter, as to render them conformable to the intentions of the parties, without regarding which was, in fact, first produced or executed: Cro. Eliz. 862. As to the use of Gilmore's name in the writing subscribed by the defendant, the decision in the action brought in his name as plaintiff against one of the subscribers, *Gilmore v. Pope*, 5 Mass. 491, is an authority in point. The defendant in that action objected to it, because he was sued in Gilmore's name, upon a contract made, in effect, with the corporation; and the objection prevailed. Gilmore

was but an agent; and the contract must be construed as made immediately with his employers. This decision, then, is an answer to the reversed objection now urged.

Judgment according to the verdict.

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## WATSON v. BOURNE.

[10 MASS. 337.]

**DISCHARGE UNDER FOREIGN INSOLVENT LAW.**—A discharge under the insolvent laws of Rhode Island of a citizen of that state, is not a bar to an action here, upon a judgment recovered in Rhode Island against such debtor, the creditor being a citizen of this state, and the debt originally accruing here.

DEBT on a judgment recovered in Rhode Island. Plea, discharge under the insolvent laws of that state. Replication, that at the time of the accruing of the debt upon which judgment had been recovered, at the time of the proceedings under the insolvent laws, and of the rendition of said judgment, and long prior thereto, and ever since, the plaintiff has been a citizen of this commonwealth, resident therein. Demurrer and joinder.

*Sproat and May*, for the defendant, urged that although the plaintiff was a citizen of Massachusetts, yet having resorted to the courts of Rhode Island, and obtained judgment therein, that judgment was the only foundation of his demand, and had been taken away by competent authority: *Baker v. Wheaton*, 5 Mass. 504 [4 Am. Dec. 711].

*Ellis, contra.*

SEWALL, J. Upon these pleadings, terminating in an issue of law, the averments in the plaintiff's replication are more immediately referred to the consideration of the court. The plaintiff relies upon the circumstance of a citizenship, and residence within this state, when his demand against the defendant first accrued as a debt, when a judgment was recovered upon it in the state of Rhode Island, and when the defendant was there discharged under the provisions of the statutes for the relief of insolvent debtors, as set forth in his plea at bar. The question to be determined is then, whether the statute pleaded by the defendant operate to bar the right, and as dissolving or releasing the contract, or as a bar only of all legal remedies, when pursued within the state of Rhode Island. The decision in the case of *Baker v. Wheaton*, cited in the argument for the defendant, is

placed altogether upon the ground that the contract originated between citizens of the state of Rhode Island, and that it remained due there, the creditor and debtor continuing members of that state until the latter obtained a legal discharge under the insolvent laws there in force. A subsequent assignment of the contract to a citizen of this state, was not allowed to have the effect of reviving it against the debtor. We recognize as a principle settled by the decision, that before the assignment the contract was determined, or all legal remedies upon it had been taken away by the *lex loci*, where both parties were subject to the provisions and effect of the statute of insolvency. An assignment of the demand, although the evidence existed in the form of a negotiable note, discredited, however, and long due, passed nothing to the indorsee, which he could enforce against the operation of statutes which, under these circumstances, had put an end to the contract itself, or to all remedies upon it, to be pursued under the title of the original creditor, holding the demand when the debtor was discharged, both being at the time citizens of the same state.

The counsel for the defendant, in the case at bar, have contended, in the argument, that a judgment recovered in any state is to the same purpose local, whoever may be the creditor, whether a citizen or a stranger there, or whatever may have been the state of the contract in this respect before the judgment recovered upon it; that this submission of his demand to the jurisdiction of the state, subjected the creditor to the laws of that jurisdiction; and that the implied contract, arising upon a judgment as evidence of a debt, is to be construed according to the law of the place where the judgment was rendered. On the other hand, upon the averments admitted by the demurrer, that the creditor in the case at bar has never been, by his residence, a member of the state of Rhode Island, or subject to its laws, his counsel has contended against any subjection to them by his attempt there to enforce his demand against his debtor, then residing within that state. And we are of opinion that a contract, upon which a transitory action arises, is not rendered local by a judgment recovered upon it. The direct means of carrying judgments into effect are necessarily local, from the reference which the execution or a *scire facias* to have execution, has to the record of the judgment, to be thereby enforced according to the authority of the jurisdiction where the judgment was rendered. But as evidence of a debt, whether *prima facie* or conclusive evidence, the implied promise arising upon

a judgment seems to be no more local than any other contract is, whether express or implied. The demand sued by this plaintiff against the defendant in the state of Rhode Island, there passed in *rem judicatum*; but the judgment, until reversed or satisfied, is evidence of a contract between the same parties, provable in another form, with the same effect. The judgment is adduced here as evidence of a just demand, and to obtain a remedy to enforce it according to our laws; and the insolvent laws of Rhode Island, or the protection under them enjoyed by the defendant in that state, are no answer in this state to an action upon this demand, unless the debt, as well as the remedy upon it, have been abolished and defeated. The provisions of the insolvent laws, pleaded by the defendant, do not profess to give the defendant a discharge to that effect under the circumstances of this case; that is, where the insolvent debtor was not in custody, and where the creditor has not availed himself of the assignment of the debtor's effects, or has neglected to prove his demand before the commissioners. There is indeed some obscurity on this subject in the provisions of the act of 1756, recited in the plea at bar. Insolvent debtors in custody are to be set at liberty by virtue of a written order to the sheriff, which is also to operate, to all intents and purposes, as a full and perfect acquittance, release or discharge, made and executed by such creditor or creditors; that is such as have become parties to the proceedings upon the application of the insolvent debtor, as it must be understood according to the directions in the former part of same section and in the next preceding section of the statute. For it is subsequently provided, that if any creditor shall refuse to bring in and prove his demand, etc., in that case he shall not have any action or suit within the colony, and that act being pleaded, shall be sufficient to bar the same. A more ample discharge by a local statute would not, however, have any different operation in this respect; for a discharge of that nature can only operate where the law is made by an authority, common to the creditor and debtor in all respects, where both are citizens and subjects. In any case, it is a bar of all remedy within the jurisdiction where the statute is in force, but the debt and duty remain until discharged in another manner, and upon other considerations; and in this view of the subject, we see no difference that can be insisted on, between the original demand, which was the foundation of the judgment, and the judgment itself.

Replication adjudged good.

This case has been cited and explained in *Blanchard v. Russell*, 13 Mass. 11; *Blake v. Williams*, 6 Pick. 305; and *Kimberly v. Ely*, Id. 453, from which it appears that the insolvent laws of any state are applicable only to contracts made or to be performed in that state, so as to bar an action on such contracts prosecuted in another state.

## DELANO v. BEDFORD MARINE INS. CO.

[10 Mass. 347.]

**CONSTRUCTION OF CLAUSE IN POLICY.**—In a policy of insurance on a ship from New Bedford to Charleston, with liberty to touch at Savannah, and at and from thence to a port or ports in Great Britain, was the stipulation: "In case of capture or detention the assured shall not abandon short of six months after notice thereof shall be given to the underwriters, unless sooner condemned." While the ship lay at Savannah, the United States imposed an embargo on all ships and vessels for ninety days, and before the expiration of the ninety days declared war against Great Britain. After the embargo took place the assured gave notice thereof, and in six months afterwards abandoned to the underwriters, having in the meantime returned to New Bedford. It was held that the restraint or detention not having continued for the term of six months the assured was not entitled to recover as for a total loss.

**ACTION** upon a policy of insurance on the ship *Emulous* for a voyage from New Bedford to Charleston, in South Carolina, with liberty to go from thence to Savannah, and at and from thence to a port or ports in Great Britain, with liberty to touch at the Cape de Verds, and at and from thence to her port of discharge in the United States. The policy contained the usual risks insured against, among which were "arrests, restraints and detainments of all kings, princes and people, of what nation, condition, or quality soever;" and at the foot of the policy was the stipulation: "In case of capture or detention, the assured shall not abandon short of six months after notice thereof shall be given to this office, unless sooner condemned." There was also in the policy an agreement on the part of the company to make certain returns of premiums, in case the risk should end at any of the intermediate ports on the voyage insured. The premium in the policy was ten and a half per cent. for the full voyage, eight and a half per cent. to be returned if the risk should end at Savannah. The plaintiff claimed as for a total loss, by reason of the laying of an embargo by the United States, for the space of ninety days, while the vessel was at Savannah; and on account of the breaking out of war between the United States and Great Britain before the expiration of that

time, so that plaintiff was unable to proceed on his voyage. The plaintiff returned to New Bedford from Savannah, having previously notified the defendants of the detention, and at the end of six months offered an abandonment, while the vessel was in New Bedford harbor. The case was submitted upon this statement of facts.

*Holmes and Whitman, for the plaintiff.*

*Dexter, contra.*

By Court, SEWALL, J. The demand for a total loss by detention, made by the plaintiff in this action, is resisted on the part of the insurers, on the ground: First. That an embargo enacted and enforced by a law of the United States, is not a loss within the clause of restraint and detentions, as a risk insured against in a contract of insurance between citizens of the United States there effected and demanded; and Second. That the embargo, enacted for three months, and by which the vessel insured in this case was detained, was not a loss within this policy, because it contains a stipulation, accepted by the assured, that in case of capture and detention, he shall not abandon short of six months after notice; and Thirdly. That the assured is not entitled to recover, because the voyage insured was relinquished, on his part, during the period of the embargo, before the right of abandoning to the insurers had accrued. We have not found it necessary to form a decided opinion upon the question raised by the first point of the defense.

An embargo is a restraint and detention by public authority, and may be considered as within the import of the clause in question. The same clause in English policies of insurance has been there spoken of as having necessarily that construction; not, indeed, in any judicial decision of the question now made respecting it, but in deciding other analogous questions: 3 Bos. & P. 298 *et seq.*; Park 81; Marsh. 437; *Hadley v. Clarke*, 8 T. R. 259. There have been, it is said, decisions in the courts of the United States, and of the several states, favorable to the assured in cases where this question was directly considered. On the other hand, the principle latterly resorted to in England, particularly in the case of the Swedish ship chartered to an English merchant, and prevented from a seasonable prosecution of the voyage by a British embargo of Swedish vessels, that acts of the government are to be attributed to the individuals of the nation, as done with their concurrence and authority: 3

Bos. & P. 291, would seem to militate with the position that an embargo by the government of the assured is a loss within the clause against restraints and detentions. It is, however, to be observed, that in the case cited, the application of the principle seems to be restricted to the case of an embargo by way of reprisal, or partial hostility, provoked by an act of hostility on the part of the government of the assured. In the detention by the embargo, the Swedish vessel had been treated, *quoad hoc*, as enemy's property; and for this act of their government British subjects were holden not to be liable, as they are not for an insurance of enemy's property, when the loss happens by British capture. For every purpose of the present inquiry, the embargo, by a law of the United States, has been considered as a loss within the policy, if any restraint or detention would be, notwithstanding the stipulation insisted on in the second point of the defense. And in determining the construction and effect of that memorandum, the opinion of the court is clearly with the defendants. A restraint and detention by an embargo has been determined to be a constructive total loss: Marsh. 439; *Rotch v. Edie*, 6 T. R. 413. As an event by which the voyage insured is lost, although the subject-matter of the contract may remain in safety, and under the control of the assured. But it is essential to the right of the assured to recover for a loss of this description, that he has the right of abandoning, and the power of exercising it; and that he actually exercises it seasonably, by abandoning to the insurers the property and subject of their contract, and entitling them to the benefit of the *spes recuperandi*. The assured, by this course of conduct, reduces the amount of damages, recoverable of the insurers, to the loss incurred by the interruption of the voyage insured; and in this course the right of the insured is restricted to the indemnity provided for by the contract. The right to abandon, and the right to recover for the total loss of the voyage insured, when the subject-matter of the contract remains in safety under the control of the assured, are therefore correlative, and when the assured, by the terms of his contract has not the right of abandoning, the mere loss of the voyage insured is not recoverable as a loss within the policy.

Thus, in the case of *Poole v. Fitzgerald*, 5 Bro. P. C. 131, the voyage and cruise insured were prevented and defeated by the mutiny of the crew, in consequence of which the vessel was detained in port; but the policy being without further account, and free of average, it was decided that the plaintiff could not

be entitled to recover but in case of a total loss; that is, as it must be understood, in case of an actual loss or deterioration of the property as distinguished from an event which prevented the assured from the use of it for a particular purpose. But the meaning and effect of a stipulation of the same import with that now under consideration, were determined by this court in the case of *Dorr v. The Union Insurance Company*, 8 Mass. 502; that it was not extend, but is to be construed as restricting the assured in the privilege of abandoning. And in applying that decision in the case at bar, we may add that this suspension of the right of abandoning is not to be regarded as a mere suspension of a particular remedy, but the property detained continues to every purpose the property of the assured, protected, indeed, by the policy against the other perils undertaken by the assured; but not in any sense lost by a restraint or detention, unless that shall be continued for the period stipulated, and further until the time when the offer to abandon is made. It is, however, contended for the plaintiffs in this case that in consequence of the embargo, and the delay thereby incurred for three months, the voyage insured was, in the event, wholly defeated and lost; and that it is competent for the assured to prove these consequences in maintaining his action upon the averment of a total loss by detention. And it is true that proof to this effect is admissible of the consequences of a particular disaster as in a case of stranding followed by shipwreck, and in other cases which might be mentioned. But in the case at bar, the declaration of war with Great Britain which defeated the voyage insured, by rendering it unlawful, is in no sense, as it regards the right of these parties, a consequence of the embargo. The two events are unconnected and distinct.

As to the voyage insured by this policy, the consequence of the embargo, supposing the detention to have terminated at the time prescribed, is unknown; and the voyage became unlawful, not in consequence of the embargo, but by those general legal principles and duties which are connected with a state of war. If the *Emulous* had been stranded and wrecked in the port of Savannah, while detained there under the embargo, the insurers would have been liable for the loss, but not upon the averment of a loss by detention, although it might be argued that it was entirely the consequence of the detention, and that but for the embargo the peril by which the ship had been lost would not have been incurred. In every question of loss demanded upon a policy of insurance it is the immediate and direct, not the re-

mote or contingent, cause of the loss which is to be regarded in stating and maintaining the title of the assured to recover upon the contract. In the case at bar, the assured having precluded himself from demanding a loss, in any event of a restraint or detention not continued for the term of six months, has failed of proving the loss averred; because an embargo of three months which was never, in fact, a restraint or detention of six months, was not a total loss, and as this case is, was not a loss of any description within the risks insured against by this policy. And this opinion renders an examination of the third point stated in the defense unnecessary as it respects the demand of loss. It may deserve attention in considering the question of return premium, made upon the count for money received to the use of the plaintiff; and it may be necessary to determine the effect upon this contract of the return of the vessel from Savannah to New Bedford. This act of the assured, or of his agent, has been treated as a deviation, that is, as a continuance of the risk beyond the port of Savannah, and a subsequent departure from the voyage, to the effect of discharging the insurer. Viewed in that light, the insurers would be entitled to their premium as upon a voyage terminating at a port in Great Britain. But it is essential to this supposition, that the voyage from Savannah should be regarded as the commencement of a voyage to some port in Great Britain. This it was not, if the suggestion made for the plaintiff, and the circumstances of necessity and caution which may be collected from the protest of the master, etc., of the ship accompanying the state of facts, are to be considered as proved. If the vessel returned to New Bedford unnecessarily, as an accommodation to the captain and crew, while waiting the termination of the embargo, the assured intending in that event to prosecute the voyage insured, this conduct may be regarded as a termination of the voyage at Savannah; or, if the measure was of necessity a measure adopted for the preservation of the property insured, and fairly directed to the benefit of the concerned, then the voyage is to be considered as terminating at New Bedford, with the same advantage to the assured, as to return premium; as if it had been explicitly terminated and concluded at Savannah. The agreement in the memorandum, respecting returns of premium, gives to the contract the effect of as many distinct insurances as there are ports designated, where the assured may, at his election, determine the risk and voyage insured. Savannah is one of these. Eight and a half per cent. of the premium was to be returned should the voyage end at

Savannah, and five per cent. if it terminated at the first port in Great Britain. This was the utmost continuance of the risk in any view of the case, and the construction of the conduct of the assured, in coming back to New Bedford, must be severe to give the voyage any continuance beyond the port of Savannah. The parties are at liberty to compromise the amount of the return premium, and if they cannot agree, the action may stand continued for an inquiry into the fact, whether the return from Savannah was in prosecution of the voyage to Great Britain.

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The rule laid down in this case as to the distinction between a remote and proximate cause of the loss, is cited with much approbation by Shaw, C. J., in *Marble v. City of Worcester*, 4 Gray, 398.

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## BIRD v. GARDNER.

[10 MASS. 364.]

**SHAW TO SUPPORT DOWER.**—Where a husband purchased an equity of redemption in mortgaged lands, and subsequently mortgaged the premises to the prior mortgagee, to whom he afterwards released all his interest, it was held that the husband did not have such a seisin as would entitle the wife to dower against the mortgagee and his assigns.

**WARRANT OF DOWER.** In March, 1801, John Moies being seised of the demanded premises, in fee, mortgaged the same to John Hawes to secure the payment of a sum of money within one year. In April, 1811, the mortgage not being satisfied nor foreclosed, Hawes, by deed acknowledged and recorded, assigned the premises with the mortgage, for a valuable consideration, to the tenant, Gardner. Moies being in the actual possession of the premises after the mortgage to Hawes, conveyed his equity of redemption to Benjamin Bird, who entered and had possession during the coverture of the demandant; but in September, 1810, Bird mortgaged the premises to Gardner, and subsequently, for a valuable consideration, released to the latter all his (Bird's) right and title in the premises. The tenant thereupon entered and has since held possession. It was admitted that the plaintiff had demanded that her dower be set off to her, prior to the commencement of this action. The cause was submitted upon this statement of facts.

*Richardson*, for the demandant.

*Chickering*, contra, cited *Holbrook v. Finney*, 4 Mass. 566 [3

Am. Dec. 243]; *Popkin v. Bumstead*, 8 Id. 491 [5 Am. Dec. 113]; *Eldridge v. Forrester*, 7 Id. 253; *Dixon v. Saville*, 1 Bro. C. B. 326.

By Court, SEWALL, J. The demandant's husband, Benjamin Bird, in his life-time purchased the premises of which dower is demanded from John Moies. They were then incumbered with a mortgage, which Moies had made to John Hawes, and which he had assigned to Gardner, the tenant. After Bird became the owner, subject to that mortgage, he conveyed the same premises in mortgage to the tenant. The first mortgage remains unpaid; and the tenant has therefore the legal title, as it was conveyed by Moies before Bird had any interest in the premises. It is upon the strength of that title by Hawes's assignment vested in the tenant that he is enabled to resist the demand of dower. The title of Bird, the demandant's husband, was a seisin during the coverture, whereof she was entitled to dower against all other persons than Moies's mortgagee and his assigns. But against them, until the redemption of the mortgage, the demandant's husband had nothing but an equity of redemption; no seisin of any estate of which his wife was dowable. The tenant, therefore, as assignee of the mortgage before the demandant's husband had anything in the premises, must prevail upon this title. It is well settled that a wife is not dowable of an equity of redemption; and as a purchaser of the premises, subject to Moies's mortgage, Bird had only an equity of redemption. The demandant's right of dower might be maintained against the second mortgage, that which her husband in his life-time made to the tenant, if his title under the first mortgage were removed; and it may be, that in a court of chancery, having a general jurisdiction in matters of equity, the demandant might have relief, and her demand of dower might be enforced by some specific remedy to compel the representative of the mortgagor to redeem: 1 Ch. Rep. 186; Hard. 469, 512. But whether this can be done in this court, with the very limited jurisdiction indulged to it which has any resemblance to the powers of a court of chancery, is at least questionable. If there is any remedy in this jurisdiction, it must be in the form of a bill in equity, which, it may be, the demandant and the representatives of Benjamin Bird are competent to maintain for the redemption of the first mortgage. The representatives of Bird are competent to redeem the two mortgages; and the claim of dower by the widow might be adjusted by some equitable arrangement, that would do justice between her and

the creditors, or heirs at law of the husband. But she has at present no remedy at law against the demandant.

Demandant nonsuited.

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The dictum that the wife is not dowable of an equity of redemption is controverted in *Snow v. Stevens*, 15 Mass. 279. But Parker, C. J., there refers to the point decided in this case with approval. Upon the question of the wife's dower in mortgaged premises, see an examination of the authorities in the note to *Hitchcock v. Harrington*, 5 Am. Dec. 232.

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## MIDDLESEX TURNPIKE CORPORATION v. SWAN.

[10 Mass. 384.]

**LIABILITY FOR ASSESSMENTS.**—Where the course of a turnpike road was altered by law, subsequent to the defendant's subscription for a certain number of shares and promise to pay all assessments thereon, it was held that defendant was not bound to pay the assessments, although he had, as one of the directors, petitioned the legislature for such alteration, and had held an office in the corporation subsequent thereto.

Assumpsit to recover the amount of assessments upon six shares in the stock of the Middlesex Turnpike Corporation. The defendant had subscribed to a writing: "We, the subscribers, hereby engage to take the shares set to our respective names, and to pay all assessments which may be laid thereon, conformable to the orders of the corporation;" but set up as a defense, that since his subscription, the turnpike road had been altered by statute, and had been located differently from the plan under which he had subscribed. In reply, plaintiffs showed that defendant had for many years acted as director, treasurer and clerk, in the corporation, and had signed the petition to the legislature, by reason of which the alteration in the turnpike was made, and that, since such change, defendant had acted as director and treasurer in the corporation.

A verdict was taken for the plaintiffs, subject to the opinion of this court.

*Peabody*, for the plaintiffs.

*Bigelow*, contra.

By Court, SEWALL, J.: This action being upon an express contract, this is to be sufficiently alleged, in point of consideration as well as promise, and is to be proved as it is alleged. The material allegations in the plaintiff's declaration are their incorporation and the authority to them to make a turnpike

road in a particular direction, specified by the statute; and a promise on the part of the defendant, not only to take certain shares in the undertaking, but to pay all assessments which would be made thereon, conformably to the act of incorporation. The statute is to be considered as expressing a grant of the legislature to the members of the corporations; and for the use of this road, when made, the corporation are to be entitled to certain tolls. And according to the further provisions of the statute, the expenditures are to be provided for by assessments upon the individual members. For this purpose the corporation are enabled to vote and assess either prospective estimates of expense, or the amount of expenses actually incurred; and the assessments, when paid, become deposits of stock, according to the respective shares and interest of each corporator. But shares are contemplated by the legislature as existing previous to the deposits of stocks; for the remedy, and the only remedy, for the collection of assessments, is a sale of the shares of delinquent members, as directed by the statute. This is obviously a very inadequate remedy against those who refuse to pay assessments, and who are only known as proprietors of shares by their consent to become proprietors, and by subscribing or undertaking for any specified number of shares.

It was, however, determined in the case of *Andover and Medford Turnpike v. Gould*, 6 Mass. 45 [4 Am. Dec. 80], that the statute which created the power of assessing, had also ascertained the remedy to compel the payment of assessments, and that no implied promise, or personal duty, results from a consent to become a proprietor of shares in a turnpike, where the corporation is established with the power and remedy of assessments. The same doctrine has been since applied in other similar cases. In a previous case, that of the *Worcester Turnpike v. Willard*, 5 Mass. 80 [4 Am. Dec. 39], it had been determined that the corporation had authority to contract with their members as individuals, and to receive of them promises for the payment of assessments, upon which the corporation would have a cumulative remedy, and would be enabled to compel the payment of assessments in a personal action; and that when, upon the faith of these promises, the corporation proceed in their undertaking, there is then a sufficient consideration on their part; and they may lawfully compel the payment of assessments, not only by selling the shares of delinquents, but also by enforcing the performance of collateral engagements and promises.

And in the same case a subscription of shares, expressing likewise a promise to pay assessments, was considered as having the effect of a collateral promise, which was enforced in a personal action against the delinquent proprietor, for the recovery of the assessments which had been laid upon his share or shares. The case at bar is urged for the plaintiffs upon the authority of this decision, and we are not disposed at this time to question either the doctrine or the construction of the written promise; and we shall apply both, as they are established by the decision last cited. But other subsequent decisions restrain us to cases identified, in every material circumstance, with the case of the *Worcester Turnpike v. Willard*, in relying upon the authority of that decision. In the case now under consideration, the written promise or subscription of the defendant is of the same import, if not in the same words, as to the payment of assessments. But on his part, his liability upon that promise, for the assessments now demanded, is contested upon the ground that the road, to which his collateral promise applied, has never been carried into effect. His subscription, at least so far as any collateral promise is to be inferred, or any liability to personal remedy, is restricted to the road then contemplated and specifically ascertained, by the reference which the subscription and promise, and the capacity of the plaintiffs to receive, necessarily had to the act of incorporation. The road therein described and authorized has never been made. The plaintiffs, therefore, if they allege the essential fact on their part, of a road made, an expense incurred according to the implied request of the defendant, and to which his undertaking was directed, are unable to maintain the allegation by any proof. Failing in this they are not entitled in this action, which supposes a personal remedy against the defendant upon his collateral promise. To this it is replied, that the defendant consented in the variation of the course of the turnpike road, from that originally established to another course subsequently permitted by an additional statute to which the defendant was a party in fact as well as constructively; that he was a director of the corporation, and as such was nominally a petitioner for the alteration of the road, and officially concerned in making the road finally accepted and undertaken by the corporation.

We cannot, however, after much consideration of the subject, admit the sufficiency of this reply. At the most that can be made of the tenor of the defendant's subscription, including his express promise to pay assessments, we discern concurrent remedies, to which the corporation became thereby entitled,

both at the time applicable to a road authorized and established in a particular course. The probable result of the defendant's engagement as a corporator is—and in this he may be subject in all respects to the corporate remedy provided by the statute—that all variations of the road, originally established, expenses lawfully incurred connected with the original design or growing out of it, which the corporation, acting in their artificial capacity, have concurred in and authorized, are within his subscription for shares, his consent to become a proprietor, subject to the by-laws, rules, votes and undertakings of the corporation, so far as these are within the scope of the original design, and so far as the legislature may permit; that being the ultimate authority to which each corporator submits himself. And this would be an answer to the supposed case of money paid on the original subscription. The promise, however, connected with this consent to become a corporator, is not to have the same latitude of interpretation. In that promise he is not a corporator, but an individual contracting with the corporation; and he undertakes in that extraordinary manner, referring to himself what the legislature had done, not to any probable subsequent grant. And it is not competent to one of the parties to change the terms of this collateral contract; and as there is no express, so there is no implied, consent, to be deduced from the circumstances proved in the case at bar, where the defendant may have been controlled by the will of the majority, or, if he concurred in the votes and proceedings of the corporation, it was as a corporator, not carrying with his concurrence any renewal of his supposed collateral promise. We decide, therefore, for the defendant in the case reported.

The decision is warranted by the case of these same plaintiffs against Locke, 8 Mass. 268, which was an action brought upon this same subscription; for the circumstances of this case are entirely the same, avoiding the inference upon which the plaintiffs have relied in this case, from the facts mentioned of the official characters and employments the defendant has had in this corporation, and his concurrence in the alterations of the road, the circumstances which we have considered, and which we think do not warrant the inference attempted to be drawn from them in the argument for the plaintiffs.

The verdict is to be set aside, and the plaintiffs are to become nonsuit.

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In *Agricultural Branch R. R. v. Winchester*, 13 Allen, 32, Chapman, J., says: "Formerly, when charters were granted, it was not customary for the

legislature to reserve power to alter or modify them. The case of *Middlesex Turnpike Corp. v. Swan* arose under such a charter. It was held that the defendant had subscribed to an object specifically ascertained; and the terms of his contract being definite, an alteration of the route of the road was an alteration of his contract, and, therefore, it could not be enforced. But all our acts of incorporation, granted since March, 1831, have been subject to amendment, alteration or repeal, at the pleasure of the legislature: Gen. Sta. c. 68, sec. 41."

## HAYDEN v. MIDDLESEX TURNPIKE CORPORATION.

[10 MASS. 397.]

**CORPORATION'S LIABILITY IN ASSUMPSIT.**—An aggregate corporation may be liable in an action of *assumpsit*; and this liability may appear by evidence of some express stipulation in the name of the corporation made by their agent duly authorized, or by evidence of some act or request of their agent within his authority where no express stipulation is proved.

Action on the case in which there was a count on an *indebitatus assumpsit*, for a *quantum meruit*, and a special count setting forth the statute of June, 1806, by which the route and course of the turnpike was changed; which enacted among things, "that the aforesaid corporation shall pay for all labor which has been performed and all damages which have been sustained, before the passing of the said act, in the town of Chelmsford, by order of the directors of the said corporation, in making the road according to the route or directions pointed out in the act, to which the act before mentioned is in addition." Plaintiffs further alleged labor and services performed, and expenditures made at Chelmsford prior to this last act, by the order of the corporation and promises on their part to pay therefor.

The labor, services and articles furnished were all on account of work done upon a part of the turnpike which the directors had agreed to make, and which had been placed under the direction of General Bridge, one of the directors. Hayden, one of the plaintiffs, employed the men and paid them out of the plaintiffs' store. Other facts appear from the opinion. A verdict was taken for the plaintiffs subject to the opinion of the court.

*Peabody*, for the defendants, contended that an aggregate corporation could not be charged on an implied *assumpsit*: 1 Chitty on Plead. 98; 5 East, 243; 2 Lev. 252; 3 Dall. 496; 3 Salk. 103; 6 Vin. Ab. 268, 287, 288, 292; 1 Bl. Com. 475; 1 Kyd on Corporations, 259, 268, 449, 450, 300.

*Stearns*, for the plaintiff. A corporation is bound by the con-

tracts of its authorized agent: 3 P. Wms. 419. A corporation can contract by its vote; and if so, there is no reason why an implied *assumpsit* will not lie: Doug. 526, n. 1; 13 East, 290; 1 Binn. 27; 7 Johns. 315; 3 Mass. 365 [3 Am. Dec. 156]; 8 Mass. 265, 326, 445, 495.

By Court, SEWALL, J. With us incorporations are by statute either mediately or immediately; and the powers, duties, incidents, and liabilities of the corporation are to be determined by the statute or statutes in which the corporation originates. Towns, parishes and proprietors of common lands, who hold meetings and regulate their proceedings under divers provisions of statutes enacted upon those subjects, are said to be *quasi* corporations, and have certainly many of the incidents of corporations aggregate; and as to these there can be no doubt of their liability in actions of *assumpsit*. The practice of bringing actions against them in that form, and of maintaining such actions by evidence of parol promises, both express and implied, has been long in continued and frequent use, and has never been questioned. Aggregate corporations in the sense which those terms have at common law, have been created also by private and particular statutes, in which the incidents, powers, duties, advantages and liabilities of the corporations are generally stated in some detail. There are general statutes to declare what shall be the incidents of all corporations established for certain purposes; and accordingly the corporations since created are by the statutes incorporating them, established with a reference to the general statute, by which corporations for those purposes are regulated: Stat. 1804, c. 125; 1808, c. 65. But it may be said as to all corporations created by special statutes that in the statute of incorporation, either expressed therein or by reference to the more general statute respecting incorporations of that character or use, that they have an authority and capacity granted them, to establish such rules and regulations as shall be necessary for the well ordering of the affairs thereof. We are, therefore, to look at their rules, and their mode of doing business of well ordering their affairs, which they themselves have adopted; and if they have practically or by the rules established neglected or dispensed with any precautions which at common law were deemed essential to the security of aggregate corporations, still if there is sufficient evidence of a common consent of a joint and corporate act, they must be considered as liable, especially where incidentals, who have trusted to the good faith of a corporation, would be injured and de-

prived of their remedy if any other construction of the doings of the corporation were adopted: 1 Chit. 98; 5 East, 239, 242; 6 Vin. Abr. 137, pl. 49. In short, this question, if there has been no direct decision upon it, has been impliedly determined by this court in several cases that have occurred. The case of *Gray v. Portland Bank*, 3 Mass. 364 [3 Am. Dec. 156], may be mentioned as one where the point was suggested; but the suggestion was overruled upon the authority of the case in *Douglas*, cited in the argument for the plaintiff, where the bank of England were said to have been considered liable in this form of action. Indeed, where the promise arises by implication of law upon proving a duty, applicable and incident to the whole aggregate corporation, their concurrence in the contract seems to be proved as fully as it can be in any case. It is necessary to prove the duty upon which the *assumpsit* is supposed to arise.

This may appear by evidence of some express stipulation fairly made in the name of the corporation, by their agent or directors, authorized by their rules and regulations or by corporate votes. The duty may arise upon some act or request of the same agency, and within their authority, where no express stipulation is to be proved. But where the duty is fully implied and understood, and arises upon a meritorious and valuable consideration, the party entitled by the consideration may maintain this action of *assumpsit*. The doubt principally arising in the case at bar, is upon the evidence offered to prove a duty of this corporation, as arising upon the consideration by which the plaintiffs would entitle themselves. They prove no request of General Bridge, or of the directors as such, or of any person acting or professing to act in the name and behalf of the corporation. The plaintiffs claim the amount of their disbursements for work done on the turnpike road. The disbursements, or the application of them, are not disputed, and General B. and other members of the corporation saw the men at work, who were employed and paid by the plaintiffs. But this evidence does not prove a request to the plaintiffs by the corporation, or by the directors, or by their authorized agent; or any stipulation, express or implied, to authorize a charge against the corporation for these disbursements. What is proved may have happened under a contract with General B., for himself individually, or in behalf of the corporation; and this contract it may be convenient in certain events to suppress. In the votes of the directors, and the authority given to General B., he was directed to make his contracts for the corporation in writing; and contracts

not reported and recognized at a certain meeting were there rescinded, at least so far as to revoke the authority given to General B., or any other agent of the directors, for any contract not then reported for allowance and confirmation. General B. was then present, and stated nothing of any contract with the plaintiffs. It is also to be observed that the authority to General B., and to the other agents, seems to have required invariably a stipulation to pay one third in turnpike shares. No tract by General B., as agent of the corporation, would be valid to charge them, from which that stipulation was omitted. No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this at common law, was a deed under the seal of the corporation: Co. Lit. 66 b; Com. Dig., tit. Franchises, 11, 12, 13. Aggregate corporations established by statute are not restricted to that formality. They have powers given them to order their affairs, and to appoint and employ agents by votes, or in such other manner as the corporation may by their by-laws direct. But no person is an agent for them who proceeds without any authority, either by letter of attorney or a corporate vote, or who acts beside the authority given him; that is, his acts will not charge them, unless subsequently assented to by some act of the corporation. Upon the whole we see no sufficient evidence of any authority which General Bridge had to bind the corporation, so as to subject them to this demand of the plaintiffs. The verdict taken in the case is therefore set aside and a new trial granted.

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## MAYNARD v. MAYNARD.

[10 MASS. 456.]

**DELIVERY OF DEED.**—Where a father executes a deed in favor of his son, and requests the scrivener to record the same and then retain it in his hands till called for, which he does, and the father reclaims and cancels the deed after the death of the son, who never had any knowledge of these transactions, it was held that the conveyance had not been perfected by delivery of the deed, and that the father was entitled to the premises as against the heirs of his son.

**ENTRY *sur disseisin*.** The defendants were the heirs at law of Abel Maynard, deceased, the son of the plaintiff, and claimed to hold the premises by virtue of a deed from the plaintiff to Abel executed under the following circumstances: The plaintiff

caused a scrivener to draw up the deed conveying the land to the son, and signed and sealed the same. At plaintiff's direction, the deed was placed on record by the scrivener, who was requested by plaintiff to keep the deed until it was called for. Abel was not present at any of these transactions, nor did it appear that he ever knew of the execution of the deed. The son having died about a year afterwards, the plaintiff called upon the scrivener, received the deed and canceled the same. It appeared by some testimony that the plaintiff had, in conversation subsequent to the execution of the deed, spoken of the premises as belonging to his son.

Pursuant to instructions, the jury found for the plaintiff, whereupon a motion for a new trial was made.

*Prescott*, for the defendants.

*Bigelow*, *contra*.

By Court. It is very clear that there was no delivery of this deed, so as to give it the effect of passing the estate from the demandant to his son, as whose widow and heirs the tenants claim. The act of registering a deed does not amount to a delivery of it; there not appearing any assent on the part of the son, or even any knowledge that the deed had been executed in his favor. A delivery of a deed, duly executed and acknowledged, to the register of deeds, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him. But the facts in the case at bar, testified by the person who acted as the scrivener and magistrate, leave no doubt of the intention of the grantor ultimately to pass his land to his son, but to keep the control over it until he should be more determined upon the subject. He may have chosen to place the deed, perfect as it was, except as to delivery, in the hands of the witness, in lieu of a devise, to operate after his decease; for nothing was wanting to its complete effect but to direct the witness to deliver it to his son after his own decease. He probably chose to consider it revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it; and having reclaimed and canceled it, the tenants can claim no title under it. Whether a creditor of his son might not have taken it in satisfaction of a debt, in consequence of the credit given by putting such an apparent title upon record, and especially as the son was in actual possession of the prem-

ises, need not now be determined. We are satisfied that the title never passed out of the demandant, and that he is therefore entitled to a recovery.

Judgment on the verdict.

See *Hatch v. Hatch*, ante, 67.

## COMMONWEALTH v. RUNNELS.

[10 Mass. 518.]

**RIOT—FORM OF INDICTMENT.**—It is sufficient if an indictment for a riot charge that the defendants unlawfully assembled “with force and arms,” and being so assembled committed the act, without repeating the words “force and arms,” as they apply to every distinct allegation.

**SAME.**—If an unlawful act is charged in the indictment to have been committed, it is unnecessary to allege that it was done *in terrorem populi*, but where the defendants went about armed without committing any act there that allegation is necessary.

**RIOT DEFINED.**—Where members unlawfully combine to disturb another in the enjoyment of a lawful right, the act is a riot.

INDICTMENTS charging that Runnels and five others, together with many more persons unknown, with force and arms did unlawfully, riotously and routously assemble to disturb the peace of the commonwealth, and being so assembled did, with shouts and huzzas, rush into the public town-house, wherein were assembled legal voters of the town for the purpose of voting for governor and lieutenant-governor, etc., and having so entered, Runnels, etc., did unlawfully and riotously with great noise and tumult, attempt to seize the boxes wherein were deposited the votes of the qualified citizens, and did then and there obstruct the selectmen chosen by the town to receive the votes, in the discharge of their duties, for the space of two hours, to the great damage of the selectmen, in derogation of the free right of suffrage of the legal voters, and against the peace, etc.

Verdict of guilty; and motion in arrest of judgment for insufficiency of the indictment.

*Tilman*, for the defendants.

*Morton*, Attorney-general, contra.

By Court, PARKER, J. The defendants having been convicted upon trial on this indictment, now move that judgment may be arrested for the causes stated in the motion, viz: 1. Because the several acts alleged in the indictment to have been done by the defendants, are not alleged to have been done with force

and arms; 2. Because they are not alleged to have been done to the terror of the people, etc.

It was also suggested in the argument that the facts stated in the indictment do not technically constitute a riot. With respect to the first objection, we think that the words "force and arms" introduced into the first part of the indictment, may, without any violence to the sense, or any offense against grammatical rules, be applied to every distinct allegation, and that they are properly applicable in this manner. It is alleged that the defendants did, on the day mentioned in the indictment, assemble unlawfully, with force and arms, and that being so assembled, they committed the acts which are the ground of the prosecution. If, in common parlance, it were asserted that three men were assembled together with clubs in their hands, and being so assembled they beat and bruised a passenger, to inquire whether they had clubs in their hands when they beat him would be not a little ridiculous. Common sense is not to be deemed a stranger to legal process, but as very influential in ascertaining the force and effect of words and sentences, which, although technical, are to receive a sensible construction.

The next objection is equally without foundation. The phrase *in terrorem populi* is used by Hawkins as descriptive of the offense denominated a riot, but it is clear there may be a riot without terrifying any one.

Lord Holt has given a distinction, founded in good sense, between those indictments in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consist in going about armed, etc., without committing any act, the words aforesaid are necessary, because the offense consists in terrifying the public; but in those riots in which an unlawful act is committed the words are useless: 11 Mod. 116. And upon consulting the precedents, we find this distinction accurately observed, there being no averment of terror where an actual violence is charged to have been riotously committed. There is still less in the last objection, viz., that the facts charged do not amount to a riot. An unlawful assembly, riotously and tumultuously disturbing the selectmen of a town, in the exercise of their duty, on a public day, and in a public place, and obstructing the inhabitants of a town in the use of their constitutional privilege of election, is a riot, and an aggravated one. To disturb another in the enjoyment of a lawful right is a trespass; and if it is done by numbers unlawfully combined, the same act is a riot.

Motion overruled.

## STACKPOLE v. ARNOLD.

[11 Mass. 27.]

**ADMISSION OF ORAL EVIDENCE.**—Oral testimony is not admissible to contradict, vary, or materially affect, by way of explanation, any written contract, whether within the statute of frauds or not, provided the contract is perfect in itself, and is capable of a clear and intelligible exposition, from the terms of which it is composed. But this rule does not prohibit the showing by parol evidence a want of consideration for a promissory note, in an action between the original parties to it, or an illegality in the transaction, or a fraud practiced upon the party to be charged. Receipts are also exempt from the application of this rule.

**ASSUMPSIT** upon three promissory notes alleged to have been signed for and on behalf of the defendant by Cook & Foster in one instance and Z. Cook in the others, as defendant's agent. Z. Cook was released by the plaintiff from all liability on the notes and then offered as a witness. He testified that the notes were given for premiums on policies of insurance effected for witness upon property of the defendant; that Cook & Foster were commission merchants, and had done business for defendant; that the policies, which were produced in evidence, were effected according to the defendant's instructions, some of which were contained in letters offered at the trial; and witness acted in the transaction as defendant's agent merely and intended to bind him by the notes. The jury were charged that if they believed the notes to have been made on the defendant's behalf, the plaintiff should have a verdict. The jury finding for the plaintiff, the defendant moved for a new trial.

*W. Sullivan*, for the defendant.

*Selfridge*, *contra*.

By Court, **PARKER, J.** (after stating the action and the evidence at the trial): A new trial is moved for, because the witness was incompetent; and also because no evidence ought to have been admitted to change the nature and effect of the contracts as they appear on the face of them, they being perfectly intelligible and unambiguous, without extrinsic evidence to alter their tendency and operation. We have no doubt of the competency of the witness, he being discharged from any liability upon the notes, and not being called to prove that they were void on account of any illegal transactions between the parties to them. Neither is there any doubt that the letters signed by the defendant, and the policies of insurance made for his benefit, were properly

admitted in evidence to show the authority of the witness to procure insurance for him; and it might have been legally inferred from this evidence that the witness had sufficient authority to make the premium notes for the defendant, had he undertaken to charge him in the form of contract which he adopted. It is well settled that written or parol authority is sufficient to authorize an act of this sort, without a formal letter of attorney under seal. But this written evidence proved nothing more than that the witness had authority to bind the defendant in this contract. Whether he had executed this authority or not, depended upon other facts, which were proved by the oral testimony of the witness; and the question now is, whether the oral testimony given at the trial, tending to prove the intention of both parties to the contract, was properly received to control and alter the tenor and effect of the notes, so as to make them the notes of the defendant, instead of being the notes of the witness, as they purport to be upon the face of them. It might be sufficient for the decision of this cause to state that no person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs.

This principle has been long settled, and has frequently been recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature. It is also held that, whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself, and no other person. This, as I have observed, is decisive against the plaintiff in the present action; but as the general ground of the inadmissibility of parol evidence in this case has been argued, and as there seems to be some uncertainty in the decisions upon this subject, it may be useful to consider the cause in this view of it, and to reconcile the several cases wherein this question has been agitated. It is somewhat remarkable that so considerable degree of obscurity should remain, at this day, upon a branch of the law of evidence so constant in its recurrence in courts of law. The fundamental principle, that deeds and specialties cannot be explained, or varied in their signification by parol evidence, if the terms made use of in the instrument are capable of sensible explanation of themselves, seems never to have been questioned. The application of the

rule to particular instruments, upon the question whether there was any latent ambiguity, has been the only source of discussion, it being always admitted that an ambiguity appearing upon the face of the instrument, which has received the appellation of patent ambiguity, must be explained by the instrument itself, taking into view all its parts; and if it is not capable of such explanation, that it is void for uncertainty; and that a concealed or latent ambiguity made to appear by some fact referred to in the instrument, may be explained by parol testimony, the evidence then being of the same nature with that which made the ambiguity appear. But it has sometimes been suggested that the rule does not apply to written simple contracts; because, it is said, there being but two descriptions of contracts, those by specialty and those by parol, and specialties being only those contracts which are under seal, all written simple contracts are parol contracts, and that, therefore, parol evidence may in all instances be applied to them.

But it is manifest from a recurrence to the authorities that there are three instead of two only classes of contracts, viz., specialties, or those by deed, written contracts not under seal, and parol or verbal contracts, where there is neither seal nor writing; and it is equally manifest that the rule of excluding oral testimony has been applied generally, if not universally, to simple contracts in writing to the same extent, and with the same exceptions as to specialties or contracts under seal. The reason of the rule applies to one of this species of contracts as well as the other. It is that when parties have deliberately put their engagements in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it shall be presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing, so that oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed or afterwards, would tend in many instances, to substitute a new and different contract for the one which was really agreed upon to the prejudice possibly of one of the parties. The rule was introduced in early times, when the most frequent mode of ascertaining a party to a contract was by his seal to the instrument; and it has been continued in force since the vast multiplication of written contracts in consequence of the increased business and commerce of the world. It is not because a seal is put to the contract that it shall not be explained away, varied or rendered ineffect-

ual; but because the contract itself is plainly and intelligibly stated in the language of the parties, and is the best possible evidence of the intent and meaning of those who are bound by the contract, and of those who are to receive the benefit of it. Another suggestion has been that the practice of excluding oral testimony from the construction of written contracts has arisen from the operation of the statute of frauds and perjuries, which requires certain descriptions of contracts to be in writing; and that to admit oral testimony to affect such contracts would be to evade the statute. Hence, it has been said that the rule has been applied only to written contracts which come within the spirit of that statute, and which could not be in force unless put in writing. But we are satisfied that this restricted application of the rule has not prevailed; and that generally oral testimony is not to be received to contradict, vary or materially affect, by way of explanation, any written contract, whether within the statute of frauds or not, provided the contract is perfect in itself, and is capable of a clear and intelligible exposition from the terms of which it is composed. The cases of *Preston v. Lerceau*, 2 W. Bl. 1249, and *Coker v. Guy*, 2 Bos. & P. 565, prove this to be the law in England.

But there are certain exceptions recognized in the English courts to this general rule, which, from being misunderstood and sometimes misapplied, have probably caused the doubts which now exist on the subject. Thus, it is common, in actions upon promissory notes, in which value is acknowledged to have been received, to permit the promisor to show, where the action is between him and the original promisee, that no consideration in fact existed to support the promise. This seems *prima facie* to be repugnant to the general rule respecting written contracts, but upon examination of the cases in which this evidence has been admitted, we think it will be found that they all rest upon fraud, practiced upon the party to be charged, or upon a failure of the consideration which produced the promise, or upon some illegality in the transaction, all of which may be proved as independent facts, tending to avoid the effect of a contract, but in no degree tending to explain or vary the terms or construction of it. So in mercantile contracts, such as negotiable promissory notes or bills of exchange, with blank indorsements, which is the usual mode of transfer, the party charged is permitted to show, as between himself and the person with whom he directly contracted, such facts as tend to prove that a restricted operation was intended to be given to

the signature, or that the transfer was upon trust, and not absolute; for in these cases the written engagement is left incomplete by the parties, and is capable of receiving a signification, different from that which usually attends the naked signature of a party on the back of a contract or on a blank paper.

The case of receipts also is exempt from the application of the rule; for a receipt is not evidence of a contract, but of payment, and it has always been permitted to show that something short of the actual terms of the receipt was intended; it being conclusive only as to the amount of money paid, and not even for that, provided any mistake can be shown to have taken place in the adjustment between the parties.

In the case of *Hunt v. Adams*, 7 Mass. 518, evidence was offered to show that at the time the note was signed by Adams as surety, it was agreed, between him and the plaintiffs intestate, that he should not be called upon until an attempt had first been made to obtain payment of Chaplin, the principal in the note. This evidence was considered by the whole court as rightfully rejected by the judge who tried the cause; and it was then ruled that parol testimony can in no case be admitted to alter the legal effect of a written simple contract. We are all of opinion that this decision, in which the late chief justice participated, was correct; and that a simple contract in writing, perfect in itself, and containing no ambiguity on the face of it incapable of explanation, cannot be enlarged or diminished by oral testimony. It may be contradicted in the sense in which that term is used in the case of *Barkar v. Prentiss*, 6 Mass. 430. But the parties must abide by what is written, if the sense and meaning of it can be understood by the court, from the terms of which they have made use.

The case now before us is a strong instance of the impropriety of admitting parol testimony. The notes offered in evidence are the notes of the witness; they have no ambiguity upon the face of them; and no doubt can be entertained of their purport and effect, without looking out of the notes for extraneous facts and circumstances, which do not apparently belong to them. The testimony of the witness would make it the contract of another instead of his own; and the other circumstances proved furnished strong corroboration of his testimony, and yet are not inconsistent with the nature of the transaction, as it would appear from the contract itself. Although it is probably true that the premium for which these notes were given was due upon a policy made for the benefit of the defendant, and that

the witness, really and *bona fide*, acted as his agent in procuring the policy, yet it is quite probable that the notes were given in their present form with a view to bind the witness, he being a merchant in credit, living in town, to whom the plaintiff could easily resort, and the defendant living at a distance, and his credit probably not known to the plaintiff. It is not unusual for underwriters, when making insurance for persons abroad, to require the absolute engagement of factors or brokers here, of whose ability they are satisfied.

It is true the witness testified that it was the intention to bind the defendant and not himself. But circumstances have changed; much time has elapsed, the witness has failed, and his recollection may not be correct. These are the very reasons why such testimony should not be admitted, where, without it, there is no question or doubt. Had the parties to these notes intended what it is now suggested that they did, it is difficult to imagine why (one of them being an insurance broker, and by profession a lawyer, and the other commission merchant, accustomed to transact business for others) the capacity in which he acted was not expressed in the note. It is so common a thing for a man, in the act of signing an instrument, to state, if such be the case, that he does for the person for whom he is acting; that the omission so to sign is of itself strong evidence that he contracted for himself, and not for another. Had the notes in this case been signed Zebedee Cook, or Cook & Foster, for John Arnold, the evidence exhibited in this case would, without doubt, be sufficient to show that the agent was authorized so to do. But although authorized, he might still act for himself; and it appears by the manner in which he signed, so to have been done.

We are all satisfied that the admission of the evidence upon which the verdict was found for the plaintiff was wrong. The verdict must therefore be set aside, and a new trial is granted.

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The decision in this case was for a long time regarded as authoritative in regard to the question of the admissibility of parol evidence to explain or modify written contracts; but the doctrine asserted that parol evidence is not admissible to charge one as principal, where nothing appears on the face of the instrument as to agency, is no longer maintainable. This was shown in a note to *McDonough v. Templeman*, 2 Am. Dec. 513.

In *Williams v. Robbins*, 16 Gray, 79, the modification in Massachusetts is well stated by Hoar, J., who says: "It was said by this court in the recent case of *Fuller v. Hooper*, 3 Gray, 341, that 'the rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument can be shown by parol evi-

dence. In other simple contracts, the rule is different.' And there is no adjudged case in this commonwealth, which can be regarded as conflicting with this rule as applied to negotiable paper. The case of *Stackpole v. Arnold*, 11 Mass. 27, was a case in which it was early applied; and that decision has been repeatedly recognized and confirmed in subsequent cases, although the reasoning of the judge who gave the opinion would lead to the application of the doctrine to contracts not negotiable, which later decisions do not countenance: *Mayhew v. Prince*, 11 Mass. 54; *Long v. Colburn*, Id. 97 (*post*); *Bradlee v. Boston Glass Mfg Co.*, 18 Pick. 350; *Bedford Com. Ins. Co. v. Covell*, 8 Met. 442; *Eastern R. R. v. Benedict*, 5 Gray, 585; *Bank of North America v. Hooper*, Id. 571; *Huntington v. Knox*, 7 Cush. 371; *Alden v. Pearson*, 3 Gray, 345; *Fiske v. Eldridge*, 12 Id. 476."

## COMMONWEALTH v. CUSHING.

[11 Mass. 67.]

**ENLISTMENT OF MINORS.**—The statutes of the United States, which prohibit the enlistment of a minor without the consent of his parent, etc., "if any he have," prohibit the enlistment of minors who have no parent, guardian, or master; and such enlistment, if not void, is voidable at the request of the minor so enlisted.

**HABEAS CORPUS** directed to General Cushing to bring into court one William Bull. The return set forth that Bull was held in custody as a deserter from the service of the United States, in which he had enlisted as a soldier. It appeared that Bull, at the time of enlistment, was eighteen years of age, that he had neither parent, guardian, nor master, and had enlisted on account of his poverty, and had stated to the enlisting officer his true age; that he left the service, being dissatisfied therewith, and went to Boston, intending there to apply for a discharge.

*Smith*, for the respondent, cited the act of congress, 11 U. S. Laws, 20, as to enlistment, in which was the proviso, "that no person under the age of twenty-one years shall be enlisted by any officer or held in the service of the United States, without the consent in writing of his parent, guardian, or master first had and obtained, if any he have," urging that such clause gave a minor, who had no parent, etc., power to enlist.

*Thatcher*, for the commonwealth.

By COURT. From a general view of the acts of congress for raising and organizing the army, we think the enlistment of all persons of every age is intended to be authorized. However this constitution may militate with the principles of the common

law respecting infancy, we think it a necessary one. The proviso cited in the argument counteracts this construction, so far, at least, as it applies to infants having parents, guardians or masters. Infants are, by the common law, incapable of making any contract binding on themselves, except in a very few instances. This incapacity is a security to them, intended for their benefit and protection. But the statutes of the United States, on the subject of enlistments, deprives them of this security and protection, unless the proviso may be considered as preventing its operation upon them. And we think that such must be its intention. The legislature ought not lightly to be presumed, in any case, thus to violate a fundamental principle of the common law.

The argument suggested by the counsel for the respondent, that a minor has the power of binding himself by any act voluntarily done, to the performance of which the law would otherwise compel him, is correct; but we think it does not apply in the case before us. The obligation to do duty in the militia, at home, under officers generally deriving their commissions from popular elections, or at any rate appointed by the domestic authority of the state government, is a very distinct thing from an enlistment into an army, subject to very different discipline, and to hardships and dangers unknown to militia service. Enlistment is a contract; service in the militia is merely obedience to a requisition of the laws to which all are subject without discrimination. It was argued that, although by the proviso referred to, infants having parents, guardians or masters, may not be enlisted without the consent of such parents, etc., yet where a minor has no parent, etc., it is lawful to enlist him, and his enlistment shall bind him.

But we cannot yield to this argument. The consequence would be, that a child, unhappily losing his parents, might, before sufficient time had passed to procure the appointment of a guardian, be enticed to enlist, and held. Such a construction is too harsh to be adopted. The true construction must be, that persons, under the age of twenty-one years, are not to be enlisted or held in service unless with the consent of their parents, guardians or masters, first had and obtained; and if they have no parents, guardians or masters, they are not to be enlisted or held in service at all. If a minor, without parents, etc., is a suitable person to enter the army in any particular case and so disposed, it will be easy, under the provisions of our laws, to procure the appointment of a guardian for him.

Perhaps the contract of enlistment by a minor is not *ipso facto* void; but we hold it voidable at his instance and request. We accordingly order and adjudge that William Bull, the minor brought before us on this writ of *habeas corpus*, be discharged from the restraint under which he is holden.

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### PERKINS v. LYMAN.

[11 Mass. 76.]

**DAMAGES CONSTRUED AS PENALTY.**—One agreed that for seven years he should not be interested in a certain trade, and bound himself, his heirs, etc., in a certain sum for faithful performance; this agreement was held not to liquidate the damages, but the sum named was to be considered in the nature of a penalty.

**DEBT.** It appeared that the plaintiffs and defendant entered into articles of agreement by which the former purchased a vessel belonging to the latter for eight thousand dollars, giving their note therefor, and the latter in consideration of such purchase bound himself, his heirs, executors and administrators, in the sum of eight thousand dollars, not to engage in any traffic with the north-west coast of America, for seven years from date. Breach alleged, and action to recover the sum of eight thousand dollars and interest from the last breach. Verdict for the plaintiff for the amount sought. The defendant prayed a hearing in chancery under the statute.

*Otis and Bigelow*, for the defendant, urged that the sum mentioned in the covenant was not to be taken as liquidated damages, but as a penalty: *Smith v. Dickenson*, 3 Bos. & P. 630; *Slowman v. Waller*, 1 Bro. C. C. 418; and that defendant was entitled to a hearing in equity to ascertain the amount due plaintiff.

*Davis, solicitor-general, and Sullivan*, contended that the sum agreed upon by the parties was in the nature of liquidated damages: *Orr v. Churchill*, 1 H. Bl. 232; *Fletcher v. Dyche*, 2 T. R. 32; *Asley v. Weldon*, 2 Bos. & P. 346; *Peirce v. Fuller*, 8 Mass. 223 [5 Am. Dec. 102].

**By Court.** There is unquestionably considerable uncertainty in the application of the cases on this subject, if not in the principles which have influenced in the decision of those cases. But one point seems to be settled. The question whether a sum of money mentioned in an agreement shall be considered as a

penalty, and so subject to the chancery powers of this court, or as damages liquidated by the parties is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct, although their words are to be taken as proved by the writing exclusively.

Perhaps there is nothing extraneous to the contract brought under our consideration in this suit which can have much bearing or influence upon the inquiry into the meaning as to the particular question now in controversy. The occasion of it is recited in the instrument; the purpose of it is very explicitly stated. But these would be consistently answered and secured as well by an agreement of liquidated damages as by a penalty, to be used as one remedy for the recovery of the actual damages sustained. If the sum of eight thousand dollars mentioned in the agreement is to be treated as liquidated damages, then for one instance in which the contract should be broken, and for a thousand in which the defendant should interfere in the trade contemplated by the parties to be secured to the plaintiffs for seven years, exclusively of him and of all acting under him, the same damages, the same amount of demand would be recovered; and having been once paid, if demanded as a penalty, there would be an end of the contract; but if demanded as damages, then it seems the demand might be repeated.

Examined in this view we see nothing which gives this contract any other determinate meaning than that of a penalty. If there is nothing to prevent the plaintiffs, in case the defendant should have injured them, in breach of his contract, to a greater amount than eight thousand dollars, from recovering upon his covenant and in that form of action, the extent of the damage actually sustained, although greatly exceeding the sum mentioned, it would be a severe construction, indeed, which should consider him liable to that amount upon one breach, however slight the injury and loss may have been. If we look to the words themselves, there is a covenant on the part of the defendant, that he will not in his own name, etc., directly or indirectly, be interested in any voyage to the north-west coast of America, etc., for the term of seven years. Then he binds himself in the

penal sum of eight thousand dollars, for his faithfully and strictly adhering to this contract. It is not said if he does so contrary to his agreement, then he will pay that sum as a satisfaction. Nor is there anything expressed which would conclude the plaintiffs, unless it be their form of action, when the amount of damages should exceed eight thousand dollars, from demanding to the extent of their loss.

Lord Mansfield expresses the distinction of liquidated damages and a penalty to secure the performance of a contract very closely and accurately, in the case of *Lowe v. Peers*, referred to in the case at bar. There is a difference, says his lordship, between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election to bring an action for the penalty, after which he cannot resort to the covenant; or to proceed upon the covenant, and recover more or less than the penalty.

Upon the whole, we are of opinion that the demand, in this case, is not for damages ascertained or liquidated by the parties to the contract, but for a penalty or forfeiture annexed to articles of agreement, a breach of which has been found; and, therefore, by the statute, the defendant is entitled to a hearing in chancery, before judgment shall be rendered.

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See note to *Graham v. Bickham*, 1 Am. Dec. 323.

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## LONG v. COLBURN.

[11 Mass. 97.]

SIGNATURE BY AGENT.—Where a promissory note was subscribed “Pro W. G.—J. S. C.,” it was held to be binding on the principal if the person signing as agent had authority, otherwise, the latter was personally liable.

ASSUMPSIT on the following note: “No. 273, \$301. Boston, 17 March, 1812. For value received, I promise to pay Mr. Edward J. Long, or order on demand, three hundred and one dollars, with interest after four months. Pro William Gill—J. S. Colburn.” It appeared that the note was given for a premium on a policy of insurance effected on property belonging to Gill, by Colburn, his authorized agent. A nonsuit was ordered with leave to move to set it aside.

*Sullivan*, for the plaintiff.

*Crane*, contra.

By Court, PARKER, J. In this case, Colburn, the defendant, is declared against upon a promissory note made by him; and, when the note was offered in evidence to support the declaration, it appearing to be as construed by the judge, a promise in behalf of William Gill, a nonsuit was directed, on the ground that the evidence offered did not support the declaration. If the note warranted a verdict against the defendant in the present action, the nonsuit must be set aside, and judgment be rendered for the plaintiff upon the default of the defendant. But we are all very clear that the nonsuit was properly ordered; it being certain that a verdict could not have passed for the plaintiff upon this evidence, if the cause had gone on to trial. It appears upon the face of the note itself, that the present defendant was not to be considered as the promisor. He signed his own name, Pro William Gill; and the plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not a special action of the case might make Colburn answerable. The authority may be by parol, by letter, by verbal directions, or may even be implied from certain relations proved to exist between the actual maker of the note and him for whom he undertakes to act; and it may sometimes be inferred from the subsequent assent or ratification of the party who is charged by the writing. But in all cases, the name of the party intended to be charged must appear upon the instrument itself.

But in the case at bar, the evidence exhibited by the defendant, although unnecessary for the purpose of discharging himself, abundantly shows that he had authority to promise for Gill, and that Gill is accountable for the contents of this note. The counsel for the plaintiff has ingeniously endeavored to construe this note into a promise of Colburn to pay this money for W. Gill. But the obvious and true construction of the instrument is a promise of Gill by Colburn, his agent or attorney. And indeed, if the construction given by the plaintiff's counsel were correct, he could not recover in the present action; for he should have set forth that, Gill being indebted to Colburn, the defendant, for forbearance, or some other legal consideration, promised to pay. There is, however, no reason to suppose this the nature of the transaction; and there seems to be no difficulty in the plaintiff's pursuing his proper remedy against Gill. The nonsuit must remain. Cost for the defendant.

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See *McDonough v. Templeman*, 2 Am. Dec. 510; and as to the personal liability of the agent, see *Dusenbury v. Ellis*, 2 Am. Dec. 144. The point decided in the principal case is recognized and adopted in many subsequent Am. Dec. Vol. VI.—11

decisions in Massachusetts. The doctrine that the principal is liable on a note when his name appears as a part of the signature, is reasserted in *Morell v. Coddington*, 4 Allen, 403; *Barlow v. Congregational Society*, 8 Id. 463; *Tucker Manufacturing Company v. Fairbanks*, 98 Mass. 105. As to the liability in an action of tort for falsely representing one's self to have authority to sign another's name, this case is cited in *Kingman v. Kelsie*, 3 Oush. 341; *Jefts v. York*, 4 Id. 372; *Ballou v. Talbot*, 16 Mass. 463; *Bartlett v. Tucker*, 104 Id. 339. Other references to this case will be found in *Hastings v. Lovering*, 2 Pick. 222; and *Williams v. Robbins*, 16 Gray, 79.

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## PHILLIPS ACADEMY v. DAVIS.

[11 MASS. 118.]

**RIGHT TO SUE FOR SUBSCRIPTION.**—Subscriptions having been made by various persons for the erection of an academy, the legislature subsequently incorporated certain trustees, and in the act of incorporation provided that all moneys subscribed should be received and held by such trustees in trust for the academy. It was held the corporation could not maintain *assumpsit* upon this agreement against one of the subscribers for the money so subscribed by him.

**ASSUMPSIT** to recover the amount of defendant's subscription to the erection of an academy in the town of Limerick. The original subscription paper, dated July 1, 1808, was produced in evidence, and was as follows: "Impressed with a sense of the advantages arising from free schools, we, the subscribers, agree to pay, or cause to be paid, the several sums affixed to our names, in money or materials, for erecting an academy in Limerick, on such land as may be given by any subscriber and adjudged most convenient and central by a majority of the subscribers." One hundred dollars was written opposite the defendant's name. The act of incorporation was passed November 17, 1808, and provided, among other things, "that all lands, moneys, or other property already subscribed, or which may hereafter be given, assigned, or transferred, to the said trustees, for the use of said academy, shall be received and held by them, and their successors in office, in trust for the said academy." The academy was erected on a lot given by one of the subscribers. A verdict was taken for the plaintiff, subject to the opinion of this court.

*Holmes*, for the plaintiff.

*Mellen and Emery*, contra.

By Court, SEWALL, C. J.\* The plaintiffs were incorporated by an act of the legislature, passed in November, 1808, subsequent to the date of the promise on which the defendant is charged in this action, brought in the name of the corporation. Whatever may be the import or effect of this promise, the plaintiffs were not the promisees, the parties recognized by the defendant in his undertaking; for at the time of the promise the corporation had no existence. The promise is not in a negotiable form; and it is not stated to have been in any manner assigned to the plaintiffs by any party, nominal or actual; and as a chose in action it is not assignable to the end of making it recoverable in the name of the assignee, unless the purpose may be considered as effected in this case by the especial interposition of the legislature.

The act of incorporation contains, it is said, a provision to this effect: All moneys which had been subscribed for the use of an academy are given to the corporation, to be demanded, recovered and received by them. As this subscription was made, it may be presumed, with a view to obtain this incorporation, and to procure the establishment of this academy, which has since taken place and been erected, according to the laudable intention of the subscribers, the corporation, although not originally entitled by the terms of the subscription, may be authorized, in the acceptance by the legislature of these donations, and in a statute enacted for the purpose, to receive these donations; and if no person had a right of action before, this, originating with the statute, may be considered as vested in the corporation. In these respects, it is contended, the case at bar differs from the case of *The Scots Charitable Society v. Shaw*, 8 Mass. 532.

The defendant, however, objects not only the want of a plaintiff competent to exact the payment of a voluntary subscription, as a demand of right, but he says there is no evidence in the case to prove any promise or contract which the law will enforce. This defense may be justly stigmatized as base and dishonorable; it may be considered as unjust, when offered under circumstances like those now in evidence. Where the legislature have had a regard to subscriptions of funds, as in the

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\* Judge Sewall was commissioned and sworn in as chief justice on the first day of this term (March, 1814), in place of Chief Justice Parsons, deceased. The court was now composed of Sewall, C. J., and Thatcher, Parker, Jackson and Dewey, JJ., the latter being appointed to fill the vacancy of Judge Sewall. Chief Justice Sewall died June 8, 1814, when Judge Parker became chief justice. Thatcher being senior would properly be entitled to fill the vacancy, but it is said declined on account of feeble health.

case of academies and other public institutions, and concurring in the design, have accepted such donations as inducements and considerations for valuable grants of public lands in aid of the professed purposes of the subscribers, it seems unreasonable and unjust that, after a grant of that kind has been thus obtained, there should be a power in the subscriber to retract with impunity, and to say that his promise of a donation, being voluntary, is no contract to be enforced against him. On the other hand, it must be allowed that, if this was the legal import of the subscription when it was made, no subsequent act of the legislature, without some concurrence of the party to be affected by it, can give an efficiency to the subscription not originally intended or implied. There is, perhaps, a remedy, so far as a public injury sustained. When the sovereign is imposed upon and deceived in a public grant, this is voidable; and the fact of deception being proved, the grant will be declared void, if this redress is demanded.

The formal objection, so far as it goes to the competency of the plaintiffs, might be got over; because the legislative provision is not incompatible with any declared intention of the party charged. But then the want of a promisee is a circumstance of some weight in determining the value and import of the promise; and this defect, in this view of the case, the legislature are not to be understood to have supplied. For a contract must be enforced according to the intentions expressed or implied, of the party making it; and there seems to be no contract where there is no mutuality, and no consideration executed or executory. The defendant is not a trustee named in the act of incorporation, and personally he has not been a party to the subsequent proceedings of the incorporated society. He is, therefore, no party to the grant from the legislature; and the right of action as to him rests altogether upon the writing he subscribed before the corporation, now plaintiffs against him, had any legal existence.

This objection, to which the defendant finally resorts, is, we think, insuperable. The writing given in evidence in this case contains no proof of a contract; there is no mutuality, no parties, no valuable consideration. It is a promise to give connected with a similar promise by others to give to the same appropriation and purpose; but these promises are not mutual among the subscribers, so as to make the promise of one, or the performance of it, a consideration for the promise of another. At the most it was a donation, to come into operation at the will

of each subscriber, which has not been confirmed by any act of the party charged. There is no evidence of any such act in the case reported; and we cannot therefore confirm this verdict, without contradicting a course of decisions in cases where this question has occurred.

The cases decided by this court, where turnpike corporations were the plaintiffs, in suits for the moneys due upon subscriptions for shares, are in point. It is said that those decisions were upon the ground of another remedy provided by the legislature in the acts of incorporation. But that was not the sole ground, if it is in any respect a reason, for those decisions. The want of mutuality of a consideration is particularly stated in the cases of *The New Bedford Turnpike v. Adams*, 8 Mass. 138 [5 Am. Dec. 81], and *The Essex Turnpike v. Collins*, 8 Mass. 292. In all the cases cited in the argument for the plaintiffs, the corporations existed when the subscription and engagement were entered into by the defendants. In the only case where the plaintiffs prevailed, there had been a meeting authorizing the proposal of a subscription, and certain terms, with peculiar advantages to the subscriber charged in that case. His subscription was upon that proposal; and the terms having been complied with he was holden liable upon his express promise not only to take shares, but to pay for them. In the cases of *Adams* and *Collins* there had been no meeting of the corporations to authorize any peculiar proposals or engagements, and this defect of mutuality is among the reasons assigned for the validity of their defense; and in the case of *Collins* that was the only reason, for in his subscription a promise to pay is expressed, as well as a promise to take shares.

The general principle is that voluntary agreements and promises, however reasonable the expectation from them of gifts and disbursements, even to public uses, when made without consideration, are not to be enforced as contracts; but where the promise is made in consequence of anything yielded to the disadvantage of the promisee, and so where it is a proposal upon a consideration afterwards performed or gained to the promisor, this may import a sufficient consideration. In the case at bar, the defendant, actuated by momentary fervor and public spirit, or anticipating perhaps some benefit to himself as well as to his neighborhood, undertakes to contribute a sum of money for the establishment and support of an academy. Others do the like. But the defendant afterwards repents, and will not confirm his stipulated donation. Here is nothing

gained to him or lost to any one else. No consideration proceeds from the public or from any person who may become constructively entitled to the subscription; for the grant of the legislature was not made to the defendant, and he has not been a party to the acceptance of it.

Upon the whole, if he insists upon retracting his subscription, we are of opinion that it is not a contract to be enforced in action at law; and according to the agreement under which the case is reserved, the verdict is to be set aside, and a nonsuit is to be entered, and a judgment of costs for the defendant.

It was suggested in the argument that some other of the subscriptions which gave birth to the Limerick academy, are likely to be disputed, in the event of a successful defense by the subscriber charged in this action. Supposing the same circumstances throughout to be proved in those cases, particularly that the subscribers to be charged are not included in the corporation, and are not liable by reason of their actual acceptance of the grant from the legislature, they must be considered as having the same power, which has been allowed to this defendant, of retracting their subscriptions; and actions would fail against them upon the principles of this decision. It may not be improper to observe further, however, upon this occasion, that a subscriber's actual acceptance of the legislative grant as if named or descriptively included in the incorporation, he has been concerned in their subsequent proceedings, and had the advantages of a member of the corporation; circumstances of that kind may be considered as entitling the corporation to the benefit of his subscription. To recover upon that title, we would suggest that an action upon an implied promise, as for money received to the use of the corporation, seems to be more suitable than an action upon a special promise, provable by the writing containing the subscription. All the circumstances supposed, being in evidence, there would be just ground to say that the defendant holds money to the amount of his subscription, which he has made the property of the corporation, and which he cannot justly retain.

Plaintiffs nonsuited.

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In *Hopkins v. Upshur*, 20 Tex. 89, 93, this case is distinguished, showing that in the principal case the subscription was made in favor of no particular person, nor was it delivered to any person. In *Amherst Academy v. Cowles*, 6 Pick. 427, the subject of a person's liability for such subscriptions is thoroughly examined, and the authority of the principal case was here examined by Parker, C. J. He states that in the principal case the objections

to the action were that the plaintiffs were not parties to the promise, and that there was no mutuality, and no consideration, which objections were sustained. As to the distinction between this and other cases where such subscriptions can be recovered, he says: "The case differs from the one before us in several particulars. The action was upon a subscription paper in common form, made before the existence of the party who brought the suit upon it, and there was no subsequent act recognizing or confirming the defendant's promise."

See Angell & Ames on Corporations, sec. 525, treating of the subject of a liability for subscriptions.

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## JACKSON v. MAYO.

[11 MASS. 147.]

**LIABILITY OF INFANT.**—A minor having received money from the plaintiff, made a promise in writing, to repay the amount to the plaintiff's daughter; and after coming of age, when applied to by the daughter's husband, said, that it was not then convenient for him to pay it, but that on his arrival at the plaintiff's place of residence, whither he was then bound, he should pay the money due him. It was held that no action could be maintained by the plaintiff on the express promise, but that on this evidence a general *indebitatus assumpsit* for money received to the plaintiff's use, might be maintained, as the evidence was sufficient to revive the debt and establish a consideration on which the law will imply a promise.

**ASSUMPSIT.** The case appears from the opinion. A verdict was taken for the plaintiff by consent.

*Todd*, for the plaintiff.

*Hopkins*, contra.

By Court, SEWALL, C.J. The defendants are charged as the executors of the last will of James Weeks, deceased, upon a promise by him in his life-time, by his note in writing, March 15, 1808. The promise alleged in the plaintiff's declaration, and proved by the note, is to this effect: That, in consideration of two thousand one hundred and ninety-five dollars paid by the plaintiff to James Weeks, he undertook and promised to account with, and pay over to, Margaret Jackson, the plaintiff's daughter, said sum of money on his arrival at Portland. The plaintiff avers that James W., after the receipt of the money did arrive at Portland, but that he never in his life-time paid over the sum so intrusted to him to the said Margaret, the daughter, or accounted for it to the plaintiff; and that the executors had also neglected to pay over or account for the same. At the trial of this action upon the general issue, the defendants proved that their testator, at the date of the promise, alleged and

proved, although master of a vessel in the West India trade, was in his age somewhat short of twenty-one years. To this defense the plaintiff replies: First. A clause in the will of James W., expressing a bequest of his estate to his sisters and brothers, after his just debts shall be paid therefrom.

The court has determined heretofore, *Smith v. Mayo* [ante, 28], in a case arising under this same will, that this clause or bequest, if it may have that name, as it respects the debts, is no answer to a defense of infancy; and that the disability of an infant to contract, unless in certain cases specially provided for with a view to his preservation and benefit, is such as renders his promise not only voidable, but void.

The plaintiff in this case insists, secondly, upon certain testimony adduced at the trial, the amount of which is, that James W., after he became of full age, having been called upon by the witness, then the husband of the plaintiff's daughter Margaret, and questioned of the money received of her father, and whether it was convenient to pay it over, J. W. answered that it was not convenient to pay it at that time, but that he was then preparing for a voyage to Jamaica, with a cargo which he should there sell for cash; and expressed his intention to proceed from thence to Honduras, and on his arrival there, to pay the plaintiff the money due him on account of the sum received for his daughter. Other circumstances are proved by his testimony, which establish very satisfactorily, if the witness is credible, an acknowledgment, on the part of J. W. after he came of age, that he had received of the plaintiff the sum of money expressed in the note to him, and in trust for his daughter. But there is no evidence of any express promise to the plaintiff himself, or of the renewal to him of the promise expressed in the note. The most that can be made of the testimony is evidence of money in the hands of the deceased, intrusted with him, which he had not in his life-time paid over or accounted for.

We have been, when this cause was argued, very explicit in expressing our sentiments of the defense resorted to in this case. The insolvency of James W.'s estate is no apology; and, however inexorable his other creditors may be, we cannot conceive that the executors are under any necessity of continuing the embezzlement of this money, or defending this breach of trust, so reproachful to the memory of their testator, for the benefit of his other creditors. The defense being insisted on, however, we must decide according to the strict principles which apply in the case; and these are, we reluctantly say,

against the plaintiff's action, in the particular form in which it is conceived.

A general *indebitatus assumpsit* for money received for the use of the plaintiff might be maintained by the evidence adduced at the trial; but not this action on the original promise. There is no evidence of an express promise to the plaintiff, made by J. W. after he came of age; but there is enough proved to revive the debt, to establish the consideration upon which the law will imply a promise to the party injured: 1 Rol. Ab. 18, b. 1, 2; 1 Ld. Raym. 389; 1 Burr. 323. The defendants refuse to consent to any amendment of the declaration; and this being a trial on a review, it is out of the power of the court to afford any aid by ordering an amendment. If the plaintiff has any redress against this scandalous fraud, it must be by another action commenced in a better form; and which it is possible, though on this point we give no opinion, may be maintained, notwithstanding any restrictions on his legal remedy, either by the statute of limitations, or the statutes respecting insolvent estates. The witness relied on for the plaintiff is, we think, competent, the objections suggested going only to his credit."

Upon the whole, the evidence reported in the case will not support the plaintiffs' declaration. The verdict for him is, therefore, to be set aside, and a new trial granted.

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## HOMER v. WALLIS.

[11 MASS. 309.]

**COMPARISON OF HANDWRITING.**—A comparison of a disputed signature of a party to a written contract with other writings proved or admitted to be genuine is admissible as evidence.

**MATERIAL ALTERATION OF NOTE.**—The procuring of a person not present at the making of a promissory note, to put his name thereto as a witness, is a material alteration of such note.

**ASSUMPSIT** by the payee against the maker of a promissory note. Defendant denied the signature, and several witnesses were called by both sides as to its genuineness. Plaintiff produced an instrument proved to have been signed by defendant, and that signature resembled the one to the note in this suit. This evidence was admitted over defendant's objection. It appeared that one Hall, whose name was affixed to the note as a witness, did not witness the execution of the note, but signed his name as a witness, at plaintiff's request, long after its date.

The verdict being for the plaintiff, the defendant moved for a new trial.

*Mills*, in support of the motion, urged that the evidence of the handwriting of the defendant was not admissible until the handwriting of the witness had been proved: *Barnes v. Trompowsky*, 7 T. R. 265; *Wallis v. Delancey*, Id. 266, in *notis*; *Swine v. Bell*, 5 T. R. 371; *Coghlan v. Williamson*, Doug. 93; *Adam v. Kers*, 1 Bos. & P. 360; *Prince v. Blackburn*, 2 East, 250. The procuring the signature of a witness, as appears in this case, makes the note void: *Pigot's case*, 11 Co. 27; *Master v. Miller*, 4 T. R. 230; *Knill v. Williams*, 10 East, 431; *Cardwell v. Martin*, 9 Id. 190.

*Dickinson*, for the plaintiff, insisted that there had been no such material alteration of the instrument as would render it void: *Hunt v. Adams*, 6 Mass. 519.

By Court, PARKER, C. J.: Several objections were made at the trial which, having been overruled by the judge, are now made the ground for a motion for a new trial. It was first objected that, as there was the name of a subscribing witness to the note, he ought to have been produced, as the signature was denied; and that no other evidence was competent in default of this. But it appearing from the report that this person was absent and out of the commonwealth, we think it was right to suffer the cause to be tried upon other evidence. It was next objected that the handwriting of the subscribing witness ought to have been proved before the plaintiff should have been permitted to resort to other evidence. But as the instrument in question is good without a subscribing witness, we do not think this strictness necessary, however it might be in relation to deeds or instruments under seal, where something more is necessary to be proved than the mere signature of the party.

In the third place, it was insisted that comparison of handwriting is in no case legal evidence, and that it being admitted in the trial of this cause, a new trial ought to be had. Whatever doubts there may now be in England as to this species of evidence, for in former times it was holden admissible, and has never yet, to our knowledge, been absolutely settled otherwise, we have no doubt that it has become, by long and invariable usage in this state, competent evidence here. It has been once or twice questioned at *nisi prius*, in consequence of an observation in Peake, but has never been made a serious question of. Indeed, we have no doubt that a comparison by the jury of the

contested signature with other writings proved to be genuine is, by the common law of this commonwealth, proper evidence. It may frequently be unsatisfactory, but sometimes it may be decisive. At any rate, like all other evidence, it is to be weighed with discretion by the jury.

Upon the remaining objection, however, we think a new trial ought to be granted, although at first we doubted. If the testimony of the person whose name appears on the note as a subscribing witness is true, he never saw the note signed by the promisor, nor subscribed it himself as a witness until many days posterior to the date; and his name was there by procurement of the promisee, to give a validity, as he supposed, to the note, which it had not at the time it was signed by the promisor. We were inclined to think that this act, although unwarrantable, was not a material alteration of the note, or, indeed, any alteration at all, because a promissory note need not have a subscribing witness. But upon further consideration, we think it a material alteration. Upon the question before the jury as to the signature of the promisor, the name of a subscribing witness present at the time probably had considerable influence. Further, as a distinction is made, in our statute of limitations, between notes with and those without a subscribing witness: Stat. 1876, sec. 5, c. 25, it cannot be considered an immaterial alteration to cause the name of a person to be placed on the note as a witness, when he was in no respect a witness to any part of the transaction. The verdict is to be set aside and a new trial is granted.

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This case is particularly cited in the Massachusetts courts, as to the effect of an alteration in a negotiable instrument; for procuring a person to sign a note as an attesting witness who did not attest it at the time, is a material alteration which avoids the note, as it tends to give a character to it which the maker had not given, and to his detriment. This is the reason given for the decision in *Willard v. Clarke*, 7 Met. 437; and to the same effect it is recognized in *Smith v. Dunham*, 8 Pick. 249; *Adams v. Frye*, 3 Met. 105, 107; *Wheelock v. Freeman*, 13 Pick. 169; *Ford v. Ford*, 17 Pick. 421; *Commonwealth v. Emigrant Bank*, 98 Mass. 16.

COMPARISON OF HANDWRITING.—The doctrine is well established in Massachusetts that a person's handwriting may be proved by a comparison with his handwriting in other instruments admitted to be genuine. On this point the case is cited in *Moody v. Rowell*, 17 Pick. 495; *Richardson v. Newcomb*, 21 Id. 317. The doctrine is well stated by Bigelow, J., in *Bacon v. Williams*, 13 Gray, 572. "The rule," he says, "as now settled in this commonwealth, concerning the competency of evidence, resulting from a comparison of a signature in dispute, with other signatures of the same party, requires that the handwriting used as a standard of comparison should be first established by

direct proof of the signature, or other equivalent evidence: *Commonwealth v. Eastman*, 1 Cush. 217; *Martin v. Maguire*, 7 Gray, 178." Accordingly, where the only knowledge a witness had of one's handwriting was a letter received in answer to one addressed to him through the mail, it was held the handwriting as a basis of comparison was not sufficiently proved: *McKeone v. Barnes*, 108 Mass. 344.

The subject is fully and ably examined in 1 Greenleaf on Evidence, sec. 576 *et seq.* The author says: "In considering the proof of private writings, we are naturally led to consider the subject of the *comparison of hands*, upon which great divergencies of opinion have been entertained. This expression seems formerly to have been applied to every case where the genuineness of one writing was proposed to be tested before the jury, by comparing it with another, even though the latter were an acknowledged autograph; and it was held inadmissible, because the jury were supposed to be too illiterate to judge of this sort of evidence; a reason long since exploded. All evidence of handwriting, except where the witness saw the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge. The admissibility of some evidence of this kind is now too well established to be shaken. It is agreed that, if the witness has the proper knowledge of the party's handwriting, he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief. The point on which learned judges have differed in opinion is, upon the source from which this knowledge is derived, rather than as to the degree or extent of it."

The rule of the common law, as stated by the learned writer, that testimony, to prove the genuineness of a disputed instrument by means of comparison of hand-writings, was inadmissible, has one well-settled exception:—If the instrument to be used as a standard is properly in evidence in the cause for other purposes, then the signature or paper in question may be compared with it by the jury: *Doe v. Newton*, 5 Ad. & E. 514. Those states of this country that have followed the common law rule, have uniformly recognized this exception: *Van Wyck v. McIntosh*, 14 N. Y. 442, a leading case on this subject in New York; *Dubois v. Baker*, 30 N. Y. 355; *Bank of the Commonwealth v. Mudgett*, 44 Id. 524; *Randolph v. Loughlin*, 48 Id. 459; *Goodyear v. Vosburgh*, 63 Barb. 156; *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Id. 209; *Brobston v. Cahill*, 64 Id. 358, where the exception is stated; *Smith v. Walton*, 8 Gill, 86; *Williams v. Drexel*, 14 Md. 566; *Tome v. Parkersburg Branch R. R.*, 39 Id. 90-93; *Whitney v. Brunnell*, 8 La. An. 429; *State v. Fritz*, 23 Id. 55; *Clark v. Rhodes*, 2 Heisk. 206; *Hanley v. Gandy*, 28 Tex. 211. In the supreme court of the United States this exception has been specifically laid down: *Moore v. United States*, 91 U. S. 270.

There are, however, many states that have departed from the common law rule, in allowing other writings not relevant to the cause, to be used, under certain circumstances, as standards of comparison. The practice of admitting such writings in Massachusetts, as settled by the principal case and the subsequent adjudications above cited, has been adopted in Pennsylvania: *Bank of Lancaster v. Whitehall*, 10 S. & R. 110; *Baker v. Haines*, 6 Whart. 284; *Travis v. Brown*, 43 Penn. St. 9; *Haycock v. Greup*, 57 Id. 438; *Clayton v. Siebert*, 3 Brews. 176; in New Hampshire: *State v. Hastings*, 53 N. H. 452; *Myers v. Toscan*, 3 Id. 48; Vermont: *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; in Ohio: *Bragg v. Colwell*, 19 Ohio St. 413; *Pavey v. Pavey*, 30 Id. 600; in Connecticut: *Lyon v. Lyman*, 9 Conn. 61. The cases that have allowed the introduction of such extraneous instruments as a means

of comparison uniformly hold that these standards must be shown to be authentic to the satisfaction of the judge. In most of these states it is competent to prove the standard genuine, but in Indiana it is laid down that, where a comparison is sought to be made by experts, the standard must be admitted to be genuine: *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 474; *Burdick v. Hunt*, 43 Id. 387. The reason of such rule is to avoid a multiplicity of collateral issues.

The states which do not recognize the common law rule differ also in the manner in which the comparison is to be made; whether by the jury alone, or whether expert testimony is admissible to establish the resemblance between the disputed writing and the writing proved or admitted to be genuine. Indiana receives the testimony of experts. "While it is true that a witness who is not an expert must speak from his knowledge of having seen the party write, or from authentic papers derived in the course of business, it is equally true that an expert may give his opinion from mere comparison:" *Chance v. Indianapolis etc., Co.*, *supra*. So also in Ohio, *Bragg v. Colwell*, *supra*; and in *State v. Hastings*, 53 N. H. 460, the court say: "When any writing is proved to be genuine to the satisfaction of the presiding judge, it shall be admitted; and comparisons may be made between that and the writing in dispute, by witnesses, who may give their opinions, founded on such comparisons; and then the writings themselves, and the testimony of the witnesses respecting the same, are to be submitted to the jury." But in Pennsylvania, it has been decided that "evidence touching the genuineness of a paper in suit may be corroborated by a comparison, to be made by the jury, between that paper and other well-authenticated writings of the same party. But mere experts are not admissible to make the comparison, and to testify to their conclusions from it. Witnesses having knowledge of the party's handwriting are competent to testify as to the paper in suit; but they, no more than experts, are to make comparison of hands, for that were to withdraw from the jury a duty which belongs appropriately to them:" *Travis v. Brown*, 43 Penn. St. 17. These conclusions are reached after a thorough and able examination of all the earlier decisions in that state. They are, however, not in conformity with the doctrine held in a majority of the states receiving as standards other instruments than those already in evidence in the cause, nor with the common law procedure act passed in England in 1854, 17 and 18 Victoria, ch. 125, which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." This act, it will be seen, overrules the common law principles as to the comparison of hands. A similar enactment has been introduced into the code of civil procedure of California, sec. 1944.

The question whether a party will be permitted to write his signature in the presence of the jury, to be adopted by them as a standard of comparison, arose in *King v. Donahue*, 110 Mass. 156, and the court there held that such signature was inadmissible to be compared with a signature the genuineness of which the party denied. The reason being "that the jury should not be troubled with the additional issue or question, whether the signature so offered is written in a constrained and forced manner or not."

in deciding the cause, one party or the other would be deprived of that protection which is guaranteed by our constitution to every citizen, "in the enjoyment of his life, liberty and property according to standing laws." We cannot, therefore, presume that the legislature expected or intended that any court, in which this action might be pending, should, contrary to their duty and oaths of office, decide in any manner not warranted by standing law. Neither can it be presumed that the legislature intended, on this occasion, to prescribe to the courts of justice the judgment which the laws of the land would require them to render on the facts disclosed in this case. This might as well be done with respect to any suit already pending as to a suit to be commenced, and in either case would be an exercise of judicial power by the legislative department of government, in violation of the express provisions of the constitution.

The resolve was certainly not intended to operate in either of these modes. It resembles much more an act for repealing or suspending the standing laws, which provide for the limitation of such actions. It is not uncommon, although it seems to be unnecessary, when a law is made, contrary to those previously existing, to add, that the new regulation shall be complied with "anything in any former act or law to the contrary notwithstanding." From the whole tenor of the resolve, as well as from the expressions quoted, it seems apparent that the legislature considered the laws in question repealed or suspended by that resolve; so that the courts might justly proceed to render such judgment as they would have done if those laws had never been enacted.

The question, then occurs, whether the statute of 1791, c. 28, on which the defendant relies for his defense, is repealed or suspended by this resolve. The words used by the legislature are certainly very comprehensive, but, taking the whole resolve together, its operation is limited expressly to the actions, suits and claims which Holden may have against the estate of H. Ranger; and it would be doing violence to the language and to the manifest intent of the legislature to extend the operation of the resolve to any other case. The statute, then, was not repealed or suspended. The said term of four years was still going on with respect to every executor and administrator in the commonwealth, who was not already discharged from his liability by force of that statute; and every executor and administrator, with respect to whom this period had already elapsed, was entitled to plead the limitation to any action which should be

brought against him, as effectually after the passing of that resolve as he could have done before it was passed.

It therefore appears, that by the laws in force at the time when this action was brought, no executor or administrator was held to answer to any suit commenced against him under the circumstances under which this action was commenced. The question returns, if there be any question, whether this court has power, by virtue of the said resolve, to hold the defendant liable to this suit, notwithstanding the laws to the contrary, which then existed in full force. This question has been already answered, unless it be contended that the general court may repeal or suspend the law with respect to any one citizen, or any one particular suit, leaving it in full force as to all others.

By the twentieth article of the declaration of rights in the constitution of this commonwealth, it is declared that the power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for. Many of the articles in that declaration of rights were adopted from the Magna Charta of England, and from the bill of rights passed in the reign of William and Mary. The bill of rights contains an enumeration of the oppressive acts of James II., tending to subvert and extirpate the protestant religion, and the laws and liberties of the kingdom; and the first of them is the assuming and exercising a power of dispensing with and suspending the laws, and the execution of the laws without consent of parliament. The first article in the claim or declaration of rights contained in the statute is, that the exercise of such power, by regal authority without consent of parliament, is illegal. In the tenth section of the same statute it is further declared and enacted, that "No dispensation by *non obstante* of or to any statute, or any part thereof, should be allowed; but the same should be held void and of no effect, except a dispensation be allowed of in such statute." There is an implied reservation of authority in the parliament to exercise the power here mentioned; because, according to the theory of the English constitution, "that absolute despotic power, which must in all governments reside somewhere," is intrusted to the parliament: 1 Bl. Com. 160.

The principles of our government are widely different in this particular. Here the sovereign and absolute power resides in the people; and the legislature can only exercise what is dele-

gated to them according to the constitution. It is obvious that the exercise of the power in question would be equally oppressive to the subject, and subversive of his right to protection, "according to standing laws," whether exercised by one man or by a number of men. It cannot be supposed that the people when adopting this general principle from the English bill of rights and inserting it in our constitution, intended to bestow by implication on the general court one of the most odious and oppressive prerogatives of the ancient kings of England. It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subject to losses, damages, suits, or actions from which all others under like circumstances are exempted.

There is no doubt that the legislature may suspend a law, or the execution or operation of a law, whenever they shall think it expedient. But in such case the law thus suspended will have no effect or operation whatever during the time for which it is so suspended. This was done with respect to the statute of 1786, c. 52, for the limitation of personal actions. That act was to have taken effect, as to certain actions, on the first of June, 1791; but by several successive statutes its operation was suspended until the first of December, 1793. So the privilege and benefit of the writ of *habeas corpus* may be suspended by the legislature, under the circumstances mentioned in the constitution. But it was never supposed that it could be suspended as to certain individuals by name, and left to be enjoyed by all the other citizens.

It would not be an exercise of greater power to enact that Mr. James, the defendant in this suit, should not be held to answer to any suit commenced against him as administrator, after the expiration of two years from the time of his accepting that trust, than it would be to enact that he should be held to answer to any such suit commenced at any time within six years. It could not in either case be properly considered a suspending of the law, which limits such actions to four years; but it would be enacting a new and different rule for the government of one particular case. In other words, it would be to ordain that the law which regulates all other suits against administrators, may be wholly disregarded by the parties in this suit, and shall have no effect in the decision of the controversy between them.

Upon the whole, the court is of opinion that the statute of

1791, c. 28, was not repealed nor suspended by the resolve before mentioned; and that the plaintiff's right of action being barred by that statute, and the defendant thereby discharged, we cannot prevent the defendant from availing himself of this ground of defense to the present suit; and when a legal defense is thus presented to us, we are not at liberty to disregard it, and to give a judgment against the defendant.

Plaintiff nonsuited.

### MOIES v. BIRD.

[11 MASS. 436.]

**INDORSEMENT BY ONE NOT A PAYEE.**—A party agreed for the sale of land, and engaged to give in part consideration his promissory note, with a sufficient indorser or surety. At the time of the conveyance, he gave his own promissory note, and subsequently a party put his name on the back of the note, as he said, to satisfy the holder, but disclaiming any liability. The latter was held liable as an original promisor.

**CASE** on a promissory note against Abraham Bird, whose name was on the back thereof in blank. It appeared that plaintiff had sold to Benjamin Bird a tract of land, the latter engaging to pay part of the purchase-money in cash, and give notes with good indorsers for the residue, or a mortgage of the property. Upon the execution of the conveyance, Benjamin Bird gave his promissory note, the note in question, and two days afterward the defendant, at plaintiff's request, wrote his name on the back, saying that he did it to make the plaintiff easy, but would not be accountable for a farthing. The judge directed the jury that if they believed that the plaintiff conveyed his land to B. Bird upon expectation of security by the name or indorsement of Abraham or William Bird, as guarantor of B. Bird's notes, and had obtained the defendant's indorsement upon the note in question in consequence of that agreement, they might find for the plaintiff; and that the indorsement in blank by the defendant was of the same effect as a signature upon the face of the note under the name of B. Bird, in which case the defendant would be considered as a surety for B. Bird in the same promise, unless the indorsement had been explained by the evidence, and proved to have been made with some different intent and purpose. Verdict for the plaintiff, the defendant excepting.

*Hastings and Worthington, for the defendant.*

*Harrington, contra.*

By Court, PARKER, C. J. [Having first reviewed the facts.] A verdict having been returned for the plaintiff, a motion is made for a new trial upon the ground that the direction given at the trial was not right in point of law; and this motion has been urged upon the court. It is insisted by the defendant's counsel, that, as the bargain for the land had been completed and the deed delivered, before the note was presented to the defendant for his signature, his undertaking was merely collateral, and not binding, for want of a consideration, and for want of a memorandum in writing according to the provisions of the statute of frauds and perjuries; or that, if the defendant be liable at all, it must be only as guarantor of the payment by the promisor; in which case evidence of such being the intent of his signature ought to have been given by the plaintiff, to maintain his action.

But we are of opinion that the direction given by the judge, upon the facts proved in the case, was right, and that the verdict is fully justified. It was in evidence that the indorsement or security of the defendant, or that of his brother William, was one of the grounds of the bargain between the plaintiff and Benjamin Bird. The plaintiff parted with his land without taking a mortgage upon the faith of receiving a note so secured. Although no evidence exists of an agreement on the part of the defendant to indorse, before the bargain was made, yet the plaintiff had a right to presume, when the names of the purchaser's brothers were mentioned to him, that there had been an arrangement between the brothers for that purpose. The signature by the defendant a day or two after the note was made of itself furnishes evidence that there had been a previous agreement or encouragement on his part to aid his brother in the purchase by lending his name; and his declaration at the time of his signature, that he gave his name to make the plaintiff easy, but that he would not be accountable, carries with it a strong implication that he was under a moral obligation to comply with some stipulation previously made, and which probably formed an inducement to the plaintiff to transfer his land. If it was a fact that his signature was in consequence of the purchase made by his brother, upon representations made that he would sign the note, although his signing was not until after the delivery of the deed, his act ought to be referred to the date of the transactions; and he must be presumed, when he signed in blank, to have assented to such a reference; so that he would be considered, in law as well as justice, as having placed his name on the note at the time it bears date, if that be necessary to give effect to his engagement.

The jury having, by their verdict, established the fact that the defendant's signature was in consequence of the bargain for the land, and of the expectation that his name would be placed upon the note, it becomes merely a question, as to the form of the action, whether the plaintiff has brought his action right, in charging the defendant with having made and signed this promissory note, or whether he should have declared against him as guarantor, after having written over his name words tending to charge him in that particular form.

It is manifest that the defendant intended to make himself liable in some form, at least, such is the intent legally to be presumed, even against his declaration at the time of signing. Had the note been made payable to him, and negotiable in its form the plaintiff would have been restricted to such an engagement written over the signature as would conform to the nature of the instrument. In such case, the defendant would have been held as indorser, and in no other form, for such must be presumed to have been the intent of the parties to the instrument. But this note was not made payable to the defendant, and therefore was not negotiable by his indorsement.

What, then, was the effect of his signature? It was to make him absolutely liable to pay the contents of the note. If he had been asked, after the note became due, to guarantee its payment, and such had been the understanding when he gave his name, it might have been necessary to declare against him as guarantor, instead of charging him as original promisor; but no such agreement is proved. He puts his name upon a note, payable to another in consequence of a purchase made by his brother, in a day or two after the bargain was made, knowing that he could not be considered in the light of a common indorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the note to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal, and we think he has a right so to do. If he was a surety, then he may be sued as original promisor: *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68]; *White v. Howland*, 9 Mass. 314 [*ante*, 71].

We are satisfied that the verdict is right, and judgment must be rendered accordingly.

Judgment on the verdict.

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In *Hawkes v. Phillips*, 7 Gray, 236, Dewey, J., referring to this case, says: "This obviates the objection relied upon, and brings the case fully within the

principle settled in *Moies v. Bird*, 11 Mass. 436, where it was held, that although the signing of the note by the defendant was subsequent to the making of the note by the principal, yet his act of signing ought to be referred to the date of the original execution of the note, and that the party signing in execution of a previous promise must be held to assent to such a reference, so that he would be considered as having placed his name on the note at the time it bore date." The doctrine of the case is adopted in Missouri: *Hooper v. Pritchard*, 7 Mo. 492; *Butler v. Gambs*, 1 Mo. App. 470. But this doctrine is not generally accepted, as in some places a person would be considered an indorser under these circumstances: See note to *Fitzhugh v. Love*, 3 Am. Dec. 568.

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## WOOD v. ROBBINS.

[11 MASS. 504.]

**LIABILITY FOR INTEREST.**—A party who has fraudulently obtained or wrongfully detained the money of another, is liable for interest from the time of his so obtaining or detaining the same.

**ASSUMPSIT** for money had and received. The question reserved was, whether the plaintiff, a person *non compos mentis*, who, sued by his guardian, was entitled to recover interest upon a sum of money obtained from him by the defendant, who had taken advantage of plaintiff's weakness of mind.

The question was submitted without argument.

By Court, PUTNAM, J. The decisions upon this subject are contradictory. In the cases of *Walker v. Constable*, 1 Bos. & P. 307, and *Tuppendall v. Randall*, 2 Id. 472, the court were of opinion that in an action for money had and received, the plaintiff should recover nothing but the net sum received, without interest. This opinion was grounded upon the case of *Moses v. Macferlan*, 2 Burr. 1010; and in that case the point was incidentally decided. Lord Mansfield is there reported to have said, that "this form of action is the most favorable way in which a defendant can be sued; he can be liable no further than the money he has received." His lordship states the case of *Dutch v. Warren*, where the plaintiff had paid the defendant two hundred and seventy-two pounds ten shillings, and he was to transfer to the plaintiff five shares in the Welsh copper mines at the opening of the books, but neglected it; that the plaintiff in that case recovered only one hundred and seventy-five pounds, being the value of the stock when it should have been transferred, and he added: "If the shares had been of much more value, yet the plaintiff could only have recovered the two hundred and seventy-two pounds ten shillings in this form of action."

Lord Ellenborough thought that interest ought to be allowed only in cases where there was a contract to pay on a day certain; or where there had been an express promise to pay it; or where, from the course of dealing between the parties, it might be inferred that this was their intention; or where the defendant had used the money: *De Haviland v. Bowerbank*, 1 Camp. 50. The same judge would not allow interest, although the defendant had obtained the money for forgery; being of opinion that fraud did not take the case out of the rule he had before laid down: *Crockford v. Winter*, Id. 129. This seems to have been approved by the court of king's bench: *De Bernales v. Fuller*, 2 Id. 427; with a limitation, however, of the rule where the money was to be paid on a day certain, to written instruments: *Gordon v. Swan*, Id. 430 *in notis*; 3 Wils. 206; and the court refused to allow interest after the expiration of the day on which payment should have been made for goods sold and delivered.

But it was formerly held that interest should be allowed on all liquidated sums, from the instant the principal became payable, and also on money lent: *Blaney v. Kendrick*, 2 W. Bl. 761; *Robinson v. Bland*, 2 Burr. 1077; Bull. N. P. 274; and that money laid out for another's use stands precisely on the same ground of reason, justice and equity: *Trelawney v. Thomas*, 1 H. Bl. 305. In the case of *Robinson v. Bland*, before cited, there was a count for money had and received, and another for money lent. There was a general verdict; and the court did not make any distinction between those counts, in respect to the allowance of interest.

The rule in equity is, to allow interest: *Elkins v. The East India Co.*, 1 P. Wms. 396. In the case now cited, the plaintiff recovered twelve per cent., the Indian interest—the matter having been transacted in India; and the court said: "If a man has money by way of loan, he ought to answer interest; but if he detains my money wrongfully, he ought *a fortiori* to answer interest; and it is still stronger, when one by wrong takes from me my money or my goods, which I am trading with, in order to turn them into money." And we are disposed to say that it is still stronger when one obtains money or goods from another by fraud and imposition.

The question has met with different decisions in the United States. In Pennsylvania, it has been held that money received, as well as paid, by mistake without fraud, does not carry interest: *Jacobs v. Adams*, 1 Dall. 50. But it is settled that interest is now recoverable there for money lent: *Dilworth v. Sinderling*,

1 Binn. 494 [2 Am. Dec. 469]; and for a balance ascertained by an auditor: 4 Dall. 287, 290; and against a man who receives the property of another, and holds it against his consent: *Commonwealth v. Crevor*, 3 Binn. 121. In New York, interest has been allowed in this form of action, where the money was paid upon a contract which was rescinded by the other party: *Gillet v. Maynard*, 5 Johns. 88 [4 Am. Dec. 329]; and it may or may not be recoverable there, according to circumstances proved: *Pease v. Barber*, 3 Cai. 266; and it is to be recovered where one converts money of another to his own use, from the time when it ought to have been paid over: *People v. Gasherie*, 9 Johns. 71 [*post*].

In this state, there has not been any distinction made as to the allowance of interest, between the cases of money had and received and the other money counts. It has been allowed in this form of action, where it was grounded on a misapplication of money paid in trust; thus where the defendant had received money to be indorsed upon a note in his hands for collection against the plaintiff, and omitted to do it, and sued the plaintiff, and recovered judgment for the whole note, the defendant was charged with interest from the time he received the money to the time of the verdict: *Fowler v. Shearer*, 7 Mass. 24.

Upon a review of the adjudged cases, and the reason of the thing, we are all satisfied that in the case at bar, where the defendant obtained the plaintiff's money by fraud and imposition, interest ought to be allowed from the receipt of the money, and not merely from the service of the writ. There may be cases where interest ought not to be allowed; as where the defendant has holden the money as a stakeholder, ready to be paid to the party entitled. But where the defendant has fraudulently obtained the money or wrongfully detained it, he must be charged with interest.

Let the verdict be amended according to the agreement in this case, by adding to the sum found by it, two hundred and one dollars ninety-four cents, the amount of the interest from the receipt of the money to the service of the writ, and let judgment be entered for the sum of twelve hundred and thirty-five dollars and twenty-eight cents, according to the verdict so amended.

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The general subject of interest, and the doctrine of this case, is considered in the note to *Selleck v. French*, *post*.

CASES  
IN THE  
SUPREME COURT OF ERRORS  
OF  
CONNECTICUT.

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SELLECK *v.* FRENCH.

[1 Conn. 82.]

**INTEREST, WHEN ALLOWED.**—In an action of book-debt for certain advancements made by the plaintiff for the defendant's use, where it appeared that there had been no mutual dealings between the parties, that the debt was due, and that payment had been unreasonably delayed, it was held interest was allowable, though the account was unliquidated, and there had been no agreement to pay interest, nor any particular custom under which it could be claimed.

Action of book-debt, brought by French against the administrators of the estate of James Selleck. The cause having been referred to auditors, they found the deceased indebted to French in the sum of one hundred and thirty-five dollars and seventy-one cents, which included ninety-nine dollars and sixty-three cents principal, and the remainder interest thereon. It appeared the account was unliquidated; that there had been no agreement for interest; and that the plaintiff was not a merchant, and not by any particular custom entitled to interest. Judgment being rendered for the plaintiff for the sum reported due, a writ of error was taken.

*B. M. Sherman and Bissell* contended that no interest should be allowed, citing, *De Haveland v. Bowerbank*, 1 Campb. 50; *De Bernales v. Fuller*, 2 Id. 426; *Gordon v. Swan*, 12 East, 419; *Walker v. Constable*, 1 Bos. & P. 307; *Blaney v. Hendrick*, 3 Wils. 206; S. C., 2 Bl. Rep. 761; 2 Com. Contr. 206; 2 New Rep. 206 n; *Swift's Ev.* 84, 85.

*J. Backus, contra.*

SWIFT, J.\* This was an action of book-debt, and the only question arising in the case is, whether interest ought to be allowed. It appears that a sum was due to the plaintiff for advancements; that there had been no mutual dealings; that the debt had not been liquidated by the parties; and that there was no special agreement or custom to pay interest. Interest was allowed by the court; and to this the defendant objects, because there was no contract or custom to pay it.

Interest by our law is allowed on the ground of some contract express or implied to pay it, or as damages for the breach of some contract, or the violation of some duty.

1. Interest will be allowed in all cases where there is an express contract to pay it.

2. The law will imply a contract to pay interest where such has been the usage of trade, or the course of dealings between the parties. Where it is known to be the custom of merchants or others to charge interest on their accounts for goods sold after a certain term of credit, the law will presume the purchaser promises to pay such interest. So where in accounts, settled interest has been charged and allowed, and the account afterwards continued, it will be presumed that interest was agreed to be paid.

3. Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange. Though a policy of insurance contains no certain day on which the losses are to be paid, yet interest will be computed from the time the money becomes due.

4. Where goods are sold and delivered, to be paid for on a day certain, and are charged on book, interest will be allowed after the term of credit has expired. If partial payments are made, interest will be allowed on the balance, though the account is unliquidated.

5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest.

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\*During this period the court was composed of Reeve, C. J., who resigned in 1815, Swift, J., being then appointed in his place; Swift, Trumbull, Edmond, Smith, Brainard, Baldwin, Ingersoll, Goddard, Hosmer, JJ. Judge Ingersoll resigned in May, 1816, having been elected lieutenant-governor of the state, and Gould, J., was appointed to the vacancy. For the organization of the court, see note, 3 Am. Dec. 255.

6. Where money is obtained by fraud or deceit, and the party injured waiving the tort, brings his action on the implied promise, interest will be allowed as damages.

7. Where an account has been liquidated, and the balance ascertained by the parties, interest will be allowed thereon, unless there should be some agreement to delay the payment.

8. Where articles are delivered, or services performed, and charged on book, and no time of payment agreed on, yet if it appear, from the nature of the transaction, that they were to be paid for in a reasonable time, and not to rest on book as a mutual account; then if payment be unreasonably delayed, interest will be recoverable as damages, though partial payments have been made, and the account has not been liquidated. If one should make advances for the benefit and at the request of another, or a mechanic should perform some considerable piece of work, as building a house, or a farmer should sell the produce of his farm, as his wheat, beef, etc., it could not be presumed that they were to rest on the footing of a mutual account on book, but that payment was to be made when the advancements were closed, the work completed and the produce delivered; of course interest would be chargeable on such accounts if unreasonably delayed, though partial payments have been made, and the accounts were unsettled; for here has been a breach of contract.

9. But where there are current accounts founded on mutual dealings, unless there be some promise or usage to pay interest, it will not be allowed; for in such cases no time of payment is stipulated, each party is making payment, the balance is constantly varying, it is understood that the demands are to remain on book, and the presumption is that interest is not to be allowed. Such is the case of farmers and mechanics in their mutual intercourse.

Such are the principles which have been long established in this state. In England there have been contradictory decisions; but it has been lately decided that interest ought to be allowed only where there is a written contract for the payment of money on a day certain, as on bills of exchange and promissory notes; or where there has been an express contract; or where a contract can be presumed from the usage of trade or course of dealings between the parties; or where it can be proved that the money has been used and interest actually made: *De Haviland v. Bowerbank*, 1 Campb. 50; *De Bernales v. Fuller*, 2 Id. 426. Interest has been refused in actions for money obtained by fraud: *Crockford*

v. *Winter*, 1 Campb. 129; for money received to the plaintiff's use: *De Bernales v. Fuller*; for goods sold and delivered, payable at a certain time: *Gordon v. Swan*, 2 Campb. 429 n; on liquidated accounts and on policies of insurance: *Kingston v. McIntosh*, 1 Campb. 518. But where goods have been sold to be paid for on a certain day in a bill of exchange, if the bill is not delivered, interest is allowed, because the bill would have drawn interest: *Becher v. Jones*, 3 Campb. 428, n.; *Porter v. Palsgrave*, 2 Id. 472; *Boyce v. Warburton*, Id. 480.

These rules do not appear to be either founded in justice, or consistent with each other. There is the same reason to allow interest for not paying money by the time it is due in the case of policies of insurance as of notes and bills of exchange; in the case of parol as of written contracts. Why should a man be liable to pay interest on a contract to deliver a bill of exchange in payment of goods on a certain day, and not be liable on a contract to pay the money for goods on a certain day? It is as valuable to receive money in hand, as a bill drawing interest. Why should the defendant be liable to pay interest, if it can be proved that he has made interest by the use of it, and not liable if he has made none? It is immaterial to the plaintiff what use the defendant has made of the money; the injury to him is the being kept out of the use of it himself.

In this case it appears that there were not mutual dealings; the advancements were all on the part of the plaintiff. It is not denied that the debt was due, and the payment unreasonably delayed; of course, the defendant became liable to pay the interest, though the account was not settled, and there was no promise or usage to pay it.

The other judges concurred.

Judgment affirmed.

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The systematic classification given in this case to questions relating to interest has given it the character of a leading case upon the subject of interest. It is styled a leading case on this subject in *Hubbard v. Callahan*, 42 Conn. 529. It is included in *American Leading Cases*, where an exhaustive note on the subject will be found, to which we might content ourselves to refer; but since that note was written there have been many valuable decisions on the subject, to which it will be useful to refer in this place.

Our law on the subject of interest, was, for a long time, influenced by certain theories, which have of late been discarded. It was considered harsh and inequitable to charge interest on money, it being considered as unproductive property. It was on this ground, it is said, that Aristotle denied interest on money: *Ord on Usury*, 3. The historical inquirer is well aware what position the Christian church held on this subject; that a charge for the

use of money was regarded as most inequitable, and acquired the name of usury, which was utterly condemned. This doctrine, for a long time, was adhered to by judicial tribunals in England; and the consequence was that the decisions in English law show a reluctance to charge interest, where it is now admitted as a matter of justice. For instance, the Statute 3 Hen. 7, allowed interest on a judgment affirmed upon a writ of error; but the judges were so conscientious as to refuse carrying it into effect. Till 37 Hen. 8, c. 9, it was unlawful to demand interest; then it was tolerated, and interest allowed at the rate of ten pounds on the hundred pounds. From this time until the year 1812, the decisions of the English courts will be found contradictory and fluctuating; and not until the time of Lord Ellenborough was there any correct, stable rule laid down. In the case of *De Haviland v. Bowerbank*, 1 Campb. 50, he laid it down that, "interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, etc.; or where there has been an express promise to pay interest; or where from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used and interest actually made." This rule does not embrace the case of money lent or advanced, upon which interest is now allowed. Still, it was a step in advance, and illustrates the progressive state of the law. The American cases regard the interest as the necessary incident to the natural growth of the money, and therefore incline to attach it to the principal, while the English have treated it as something distinct and independent, recoverable only by virtue of some positive agreement: *Kelsey v. Murphy*, 30 Pa. St. 340; *Sedgwick on Damages*, 383.

Interest is now allowed on two grounds; namely, on contract, express or implied, or by way of damages. This distinction was made in the principal case, and it has since been adhered to by our courts, and writers on this subject, and is well deserving of regard as a philosophical distinction.

UNDER SPECIAL AGREEMENT.—Limited only in the case of usury laws, of course parties can make their own express agreement for the payment of interest. Sometimes, however, where the agreement is not explicit the law has to declare its effect. Thus where a note is given payable generally with interest, the interest will begin from the date, for such a note is payable presently: *Sheehy v. Mandeville*, 7 Cranch, 208, 217; *Freeland v. Edwards*, 2 Am. Dec. 620; *Pittman v. Barrett*, 34 Mo. 84. But if payable on demand, interest is only allowed from time of demand, for the debtor is not considered in default until a demand is made: *Dillon v. Dudley*, 1 A. K. Marsh. 66; *Bartlett v. Marshall*, 2 Bibb, 467; *Dodge v. Perkins*, 9 Pick. 369; *Breyfogle v. Beckley*, 16 Serg. & R. 284. A promissory note payable at a day certain, "with lawful interest until paid, but if the principal shall be punctually paid when due, then in that case, and not otherwise, the interest is to be deducted," if not paid at maturity, bears interest from date: *Ely v. Witherspoon*, 2 Ala. 131. And interest on a promissory note for a particular sum, payable with annual interest on the happening of a certain event, should be computed from the date of the note: *Washband v. Washband*, 24 Conn. 500.

A special agreement to pay interest, gives a right of action to recover the interest although the principal debt be not due at the time when the interest becomes payable: *Fake v. Eddy*, 15 Wend. 76; *Edgerton v. Aspinwall*, 3 Conn. 445; *Stearns v. Brown*, 1 Pick. 530; *Radford v. Southern Life Ins. Co.*, 12 Bush, 434. So upon a contract to pay a sum of money in installments, the payments to commence at a future time "with interest," the interest begins to run from the making of the contract: *Commers v. Holland*, 113 Mass. 50.

An agreement to pay interest half yearly, or quarterly, on a note payable a year after date is valid: *Mowry v. Bishop*, 5 Paige, 98; *Wilcox v. Howland*, 23 Pick. 167; *Quimby v. Cook*, 10 Allen, 32. But when nothing is said as to the time when the interest is payable, as where one agrees to pay a certain sum in three years after date with interest, the interest is receivable only at the expiration of three years, and not annually: *Cooper v. Wright*, 3 Zab. 200.

When an agreement is made to pay a certain rate up to maturity, but nothing is said as to the rate of interest afterwards, a perplexing question arises as to what rate should be charged after maturity, whether that previously agreed on, or the legal rate, where such is established; and there are decisions on both sides. In *Kohler v. Smith*, 2 Cal. 597, a note was payable two months after date, with interest at five per cent. per month, and it was held that interest after maturity should be charged at the rate of sixty per cent. per annum, and not at the ordinary rate of ten per cent. Contrary to this is the case of *Ludwick v. Huntzinger*, 5 Watts & S. 51, where the contract was for payment on a fixed day, with interest at three per cent., and it was held that if not paid on the day, the subsequent interest should be six per cent. The United States supreme court follow the rule of the latter case: *Brewster v. Wakefield*, 22 How. 127; *Burnhise v. Firman*, 22 Wall. 170. See 3 Parsons on Contracts, 104, giving decisions on each side. In *Cromwell v. County of Sac*, 96 U. S. 61, Field, J., gives a very good summary of the cases on both sides, but inclines to the view that the interest after should be the same as that stipulated for before maturity. The decision is important as giving a construction to *Brewster v. Wakefield*, *supra*, different from that which it had been previously understood to have. He says: "The bonds by their terms, as already stated, bear interest at the rate of ten per cent. until maturity. The plaintiff claims that they should draw the same rate of interest after maturity, and that, under the statute of Iowa, the judgment should also bear ten per cent. interest. The court below allowed only seven per cent. on the bonds after maturity, that being the rate in New York, where the bonds were payable, and only six per cent. on the judgment. In this ruling we think the court erred. By the settled law of Iowa, as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards: *Hand v. Armstrong*, 18 Iowa, 324; *Lucas v. Pickel*, 20 Id. 490. A like decision has been made in several of the states upon similar statutes: *Brannon v. Hursell*, 112 Mass. 63; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Monett v. Sturges*, Id. 384; *Kilgore v. Powers*, 5 Blackf. 22; *Phinney v. Baldwin*, 16 Ill. 108; *Etnyre v. McDaniel*, 28 Id. 201; *Spencer v. Maxfield*, 16 Wis. 178, 541; *Pruyn v. City of Milwaukee*, 18 Id. 367; *Kohler v. Smith*, 2 Cal. 597; *McLane v. Abrams*, 2 Nev. 199; *Hopkins v. Crittenden*, 10 Tex. 189. There are, however, conflicting opinions; but the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment: *Pearce v. Hennessy*, 10 R. I. 223; *Lash v. Lambert*, 15 Minn. 416; *Searle v. Adams*, 3 Kan. 515; *Kitchen v. Bank of Mobile*, 14 Ala. 233. \* \* The case of *Brewster v. Wakefield*, 22 How. 118, is cited against this view. That case came from a territorial court, and arose under a statute which allowed parties to agree upon any rate of interest, however exorbitant, and only prescribed seven per cent. in the absence of such agreement. This court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interest stipulated in that case, gave a strict construction to the contract of the parties." Notwithstanding what is here said by the distinguished judge, it is yet questionable if the preponderance of opinion is decidedly in favor of allowing the stipulated interest after

maturity; for the opposite view is held by the courts of Pennsylvania in *Ludwick v. Huntzinger*; of New York, in *United States Bank v. Chapin*, 9 Wend. 471; *Macomber v. Dunham*, 8 Id. 550; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; of Maine, in *Eaton v. Boissonnault*, 67 Me. 540; of Connecticut, in *Hubbard v. Callahan*, 42 Conn. 524; of Rhode Island, in *Pearce v. Hennessey*, 10 R. I. 223; of Kentucky, in *Rilling v. Thompson*, 12 Bush, 310; of Alabama, in *Kitchen v. Bank of Mobile*, 14 Ala. 283; of Kansas, in *Searle v. Adams*, 3 Kan. 515; of Ohio, in *Brockway v. Clark*, Wright, 727; of Minnesota, in *Moreland v. Lawrence*, 23 Minn. 84. In the house of lords, in England, in a recent case, *Cook v. Fowler*, L. R. 7, H. L. 27, the same rule is followed. In a recent case in Maine, *Paine v. Caswell*, February, 1878 (see 6 Reporter, 52), it was held that on a note payable on demand, with interest at ten per cent., that rate is recoverable up to the date of the verdict, when damages are assessed by a jury, and up to the date of judgment when a default is entered in a suit on the note. The note read: "For value received, we promise to pay John S. Paine, or order, five hundred dollars and interest at ten per cent." Peters, J., in giving the opinion, says: "The question is, for how long a period can the plaintiff require that rate of interest to be paid? The note, although not so expressed, is on demand. Where a note is payable on time, with interest exceeding six per cent., no more than six per cent. is recoverable after maturity, there being no bargain for interest after that time. In such case interest after the note is due is allowed by way of damages." *Eaton v. Boissonnault*, 67 Me. 540. It is different, however, if the note stipulates for extra interest after, as well as before, it is due. In such case, the rate of interest is collectible according to the contract: *Capen v. Crowell*, 66 Me. 282. Applying this doctrine, as well as it can be applied to the present case, we think interest at the rate agreed should be reckoned up to the date of judgment to be recovered upon the note. The meaning of the parties could not have been that interest at the rate named was payable until the note was due and not after, because there was no time after the note was delivered before it became due. It was due instant. It could have been sued by the plaintiff on the moment he received it."

There is much soundness in the position that where the contract is silent as to the rate of interest after maturity, that the legal rate should be allowed. Those who maintain the opposite view hold it to be a presumption of the parties that the rate stipulated before should continue after maturity; but this is opposed to the rule that after a failure to pay, interest is then given not according to contract, but in the nature of damages, and then the rule of damages, the legal rate of interest, should govern.

UNDER AN IMPLIED CONTRACT.—The notion that money is unproductive no longer obtains; it is now assumed that he who has the money of another, by way of a loan or advance, derives a certain advantage, and on this ground it is presumed he engages to pay for such accommodation, and a contract to pay interest is therefore implied. The English courts did not admit a liability for interest where money was loaned or advanced; but our courts hold a person liable, on the ground of an implied contract. One of the best cases where this subject is discussed is *Reid v. Rensselaer Glass Factory*, 3 Cow. 393; S. C., on appeal, 5 Id. 587. The doctrine is here laid down that interest is allowable for money lent or advanced, where there is no special agreement to pay interest. The same doctrine is held in *Dilworth v. Sinderling*, 2 Am. Des. 469; *Winthrop v. Carleton*, 12 Mass. 4; *Curtis v. Innerarity*, 6 How. 156. So where one pays money to the use or for the benefit of another, he is entitled to interest: *Gibbs v. Bryant*, 1 Pick. 118; *Chamberlain v. Smith*, 1 Mo.

718; *Thompson v. Stevens*, 2 Nott and McC. 493. And whenever money has been received by a party, which *ex æquo et bono* he ought to refund, interest follows as a matter of course: *Barr v. Hasseldon*, 10 Rich. Eq. 53; *Rapelje v. Emory*, 1 Dall. 349; *Abbott v. Wilmot*, 22 Vt. 437; *Olose v. Fields*, 13 Tex. 623; *Wood v. Robbins*, 11 Mass. 504, *ante*, 182; *Atlantic v. Nat. Bank v. Harris*, 118 Mass. 147.

Where money is advanced upon the purchase of grain, only a portion of which is delivered, interest is recoverable upon the excess of money advanced above the value of the amount of grain delivered: *Cease v. Cockle*, 76 Ill. 494. Where money is paid by mistake, interest can only be allowed from a demand and refusal: *Simons v. Walter*, 1 McCord, 97.

INTEREST BY RIGHT OF USAGE.—The course of dealing, or the usage established in a particular place, will, if well known, charge a person with interest: *Sedgwick on Damages*, 376; *Crosby v. Mason*, 32 Conn. 482. Thus, where it is the custom to sell merchandise upon a credit of six months, and from that time to charge interest until payment, the jury may allow interest after six months: *Bispham v. Pollock*, 1 McLean, 411; *Raymond v. Isham*, 8 Vt. 263. So a trader whose uniform custom is to charge interest after ninety days, upon articles sold, is allowed to charge accordingly to those who are in the habit of dealing with him: *McAllister v. Rea*, 4 Wend. 483. In *Koons v. Miller*, 3 Watts and S. 271, it was held, upon an account current between a wholesale merchant in Philadelphia and his customer in the country, upon which partial payments have been made, that interest is chargeable from the end of each six months after the sale and delivery; and this on the ground of a well-established custom. So the custom of the merchants of Pittsburgh to charge interest on goods sold after six months is so universal and notorious, that it necessarily enters into the contract as a part of it; and the courts are bound to take notice of this custom as a part of the law: *Watts v. Hoch*, 25 Pa. St. 411. Under this head, *Esterlee v. Cole*, 3 N.Y. 502, is an instructive case, where it is held that the law will not give interest on running accounts unless there is a stipulated time of credit, which has expired, or unless there is an express or an implied agreement to pay interest. Such agreement may be inferred from the course of dealing between the parties; it may also be inferred from the uniform practice on the part of the creditor known to the customer, or from the general usage of a particular trade. In *Meech v. Smith*, 7 Wend. 315, a forwarding merchant was held entitled to charge interest on his account where his customer knows that such was his ordinary usage.

BY WHAT LAW GOVERNED. The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed; and in all cases where interest is expressly or impliedly to be paid: *Steward v. Ellice*, 2 Paige, 604; *Thompson v. Ketchum*, 4 Johns. 285; *Fanning v. Consequa*, 17 Id. 511; *Murphy v. Gaskins*, 28 Gratt. 207; *Conner v. Belmont*, 2 Atk. 382; *Story on Conf. Laws*, sec. 291; 2 Kent Com. 460. The rule of the civil law was: *Usurarium modus ex more regionis ubi contractum est constituitur*: Dig. lib. 22, tit. i., l. i.; see 2 Burge, *Colonial Laws*, 860. This author lays it down, *supra*: "If the contract reserve to the vendor lawful interest without specifying the rate, that rate is considered to have been reserved which is allowed by the *lex loci contractus*, whether it exceeds, or is less than that allowed by the *lex loci rei sitæ*. He cannot reserve a rate of interest, allowed by the latter law, if it be prohibited by the *lex loci contractus*." As to what is to be considered the *lex loci contractus*, the same author says: "When the contract neither expresses nor implies that it is to be performed in any other place than that in which it is made, the presumption of

law is that it is to be performed in the place where it is made. But if it be expressed or implied that it is to be performed in another place, the latter is the *locus contractus*."

The decisions therefore uniformly hold that interest is allowed according to the rate established by the law of the country where the contract is made, or where it is to be performed when no rate is expressly mentioned; and when the rate is mentioned, whether it be legal or illegal depends upon the fact of its being permitted or prohibited by the law of that place. Accordingly, a note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only: *Scofield v. Day*, 20 Johns. 102.

Where bonds and a mortgage to secure payment thereof are made in New York between the parties resident there, and no provision is made for the payment of the bonds elsewhere, they are presumably to be paid in New York, and interest is to be computed according to the laws of that state, although the mortgage given to secure them is made upon real estate in Rhode Island: *Kavanaugh v. Day*, 10 R. I. 393. To the same effect, see *Lewis v. Ingersoll*, 1 Keyes, 347.

When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will be upheld: *Cromwell v. County of Sac.*, 96 U. S. 62; *Miller v. Tiffany*, 1 Wall. 298; *Chapman v. Robertson*, 6 Paige, 627; *Kilgore v. Dempsey*, 25 Ohio St. 413; *Peck v. Mayo*, 14 Vt. 33; *Butters v. Olds*, 11 Iowa, 1; *Story Confl. of Laws*, sec. 291.

So a contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would nevertheless be valid in England; and so a contract to allow interest upon credits given at Gibraltar at such higher rate would be valid in favor of the English creditor: *Harvey v. Archibald*, 3 B. & C. 626.

When interest is allowed not under contract but by way of damages, the rate of the *lex fori* must govern: *Goddard v. Foster*, 17 Wall. 123.

**INTEREST AS DAMAGES.**—Interest by way of damages for the wrongful detention of a debt is a distinct principle of liability, from that which gives compensation for a use or benefit derived from the money of another: *Hummel v. Brown*, 24 Pa. St. 313; *Sedgwick on Damages*, 374. So interest is defined by Domat as a reparation of damages which the law directs to be made to creditors in sums of money, by debtors who fail to pay what they owe. "Debtors," he says, "incur the penalty of interest by their delay to pay what they owe, according as the said delay may be imputed to them, and may have that effect; which depends on the nature of the credits and on the circumstances; for in some debts the bare default of paying at the time of payment makes the interest to run for the benefit of the creditor, although he do not demand it; and in other debts this interest is not due except from the time that a demand has been made:" 1 Domat, book 3, tit. 5. In *Obermyer v. Nichols*, 6 Binn. 159, *post*, Tilghman, C. J., says that interest is now allowed, generally in all cases where one person detains the money of another unjustly and against his will, and that it is considered as a compensation for the damages sustained by the plaintiff in consequence of the defendant's breach of contract. Substantially the same language is used by Hastings, C. J., in *Davis v. Greely*, 1 Cal. 422.

The material question in such cases seems to be whether the debtor is legally in default. When a note, bond or other instrument is expressly payable at a time certain, the debtor is in default if he does not pay at that

time, and interest runs from the day of payment: *Jacobs v. Adams*, 1 Dall. 52. And if a note be payable at a fixed time, as at one day after date, and there be a subjoined agreement that suit shall not be brought as long as the maker is alive, or the payee is satisfied that he is solvent, interest still runs from the time the debt is legally due: *Powell v. Guy*, 3 Dev. & B. 70; *Rollman v. Baker*, 5 Humph. 406.

INTEREST DEPENDING ON DEMAND.—In many cases before interest can be allowed as damages for a default in the payment of money, a demand is essential to fix the default. This default or delay in the discharge of an obligation was known by the name of *mora* in the civil law. When a person, bound by a contract, delayed to execute it, and this delay, *mora*, was of such a kind that *culpa* could be implied, he was subject to something more than the necessity of fulfilling the contract, and especially he was in most cases liable to pay interest, *usura*, as it was styled: See Sandar's Justinian, Hammond's ed. p. 403. Where a note or bond is payable on demand, or on request, although it is suable at once, yet the debtor is not considered in default until demand is made, and, therefore, interest runs only from the time of demand *in pais*, or of suit brought, which is a judicial demand: *Dodge v. Perkins*, 9 Pick. 369; *Hunt v. Nevers*, 15 Id. 500; *Lancers v. Lovering*, 30 N. H. 511; *Bartlett v. Marshall*, 2 Bibb, 467; *Wells v. Abernethy*, 5 Conn. 222. Where a note was expressed payable on demand, it was held interest was to be allowed only from the time of demand, and no demand having been made until the action was brought, interest was allowed from that time: *Scudder v. Morris*, 4 Am. Dec. 382. The rule that interest runs from the time of demand applies to a note payable on demand for money lent on the day of date: *Schmidt v. Limehouse*, 2 Bailey, 276. In cases of contingent liability, such as that of a surety, the party is not considered in default until notice or demand, when interest will begin to run. Thus, on a guaranty of the payment of notes, not above a certain amount, discounted at a bank, it was decided that the party was liable to the extent of the guaranty for all unpaid notes, with interest from the time that notice of non-payment was given: *Washington Bank v. Shurtleff*, 4 Met. 30. Where a note is stipulated not to be payable until the payee shall do some act, notice of the performance of the act must be given before interest begins to accrue, as the act lies more in the knowledge of the party who is to do it: *Hodges v. Holeman*, 2 Dana, 396. When a bill of exchange, payable at so many days is accepted generally, it was held the acceptor was liable for interest from the expiration of the time, without a demand, but when payable at a particular place, a demand must be made at that place to entitle the party to interest: *Laing v. Braileford*, 1 Bay, 222; *Ash v. Brewton*, Id. 243. But in *Miller v. Bank of Orleans*, 5 Whar. 503, this distinction was not sustained, and it was held that the acceptor of a bill payable at a bank was liable for interest, though the bill was not presented for payment at the bank, if he had not funds in the bank ready to be appropriated to the payment of the bill, and was not liable if he had. It must be, however, understood that where a person wrongfully detains money, no demand is necessary to charge him with interest: *Atlantic Bank v. Harris*, 118 Mass. 147; *Cooper v. Coates*, 21 Wall. 105; *Paige v. Willett*, 38 N. Y. 28; *Wood v. Robbins*, 11 Mass. 504. But when there is no wrong in detaining the money, a demand is necessary to charge the party with interest. Thus, in an action to recover back usury paid, it has been held that interest is due only from the time that the party has reclaimed the money by demand or suit brought, because the money was paid to be used by the defendant as his own money, and the plaintiff had a

perfect right to permit him to do so, and the defendant was not in default for not refunding: *Wood v. Gray*, 5 B. Mon. 92. So an ordinary factor or receiving agent receiving money for his principal, and bound to pay on order or demand, is not liable for interest, before a demand made, unless he uses the money, or has received special instructions to remit as fast as the money is received, or is in default for not rendering an account: *Williams v. Storrs*, 6 Johns. Ch. 353; *Crane v. Dygert*, 4 Wend. 675; *Dodge v. Perkins*, 9 Pick. 269. But no demand is necessary where there was a duty on the defendant to remit the money; and in such a case, interest is recoverable from the time when it should have been remitted: *Stacey v. Graham*, 14 N. Y. 492.

**INTEREST ON LIQUIDATED ACCOUNTS.**—It is laid down that no interest can be allowed on an unliquidated account: *McConnico v. Curzen*, 1 Am. Dec. 540; *Neal v. Keel*, 4 T. B. Mon. 162; *Palmer v. Stockwell*, 9 Gray, 237; *Graham v. Williams*, 16 Serg. & R. 257; *Adams Ex. Co. v. Milton*, 11 Bush, 49; *Brady v. Wilcoxon*, 44 Cal. 239. It is only when an account is liquidated, when the amount is ascertained, and therefore a party is apprised of his liability, that interest can be charged. In *People v. New York*, 5 Cow. 331, the general principle is stated "that whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest if he neglects to pay;" and the rule is laid down in substantially the same terms in *Hunt v. Jucks*, 1 Am. Dec. 555; and see *Swett v. Hooper*, 62 Me. 54, to the same effect. As to when an account is considered liquidated, we find a very good rule in *Clark v. Dutton*, 69 Ill. 521, where it is held that a debt is liquidated when it is certain what is due and how much is due; and although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated. An unliquidated debt is one which one of the parties cannot alone render certain. And in this case it was held that when a party receives notes, property and cash, for which he agrees to execute his promissory note in a given sum to the party letting him have the same, this will make the account or debt a liquidated one, and interest will be recoverable. And when parties are engaged in continuous dealings, the presentation of bills at various times stating parts of the account does not raise the presumption of liquidation, under which interest is therefore chargeable upon the balances shown to be due: *Raymond v. Williams*, 40 Iowa, 117. But an account may be considered liquidated when on being rendered to the debtor no objection is made: *Walden v. Sherburne*, 15 Johns. 224; *Haight v. McVeagh*, 69 Ill. 624.

Where a statute provided that interest at six per cent. may be allowed on money withheld by an unreasonable and vexatious delay of payment; and a party owing an account in October, 1871, admitted its correctness, and promised to pay the same which he neglected to do, without any excuse for about three years, it was held that he was properly chargeable with interest on the same, the delay being considered unreasonable and vexatious; *Daniels v. Osborn*, 75 Ill. 615.

There are cases, however, where though the account is unliquidated, yet a party is chargeable with interest being delinquent in the payment or discharge of an obligation: *Feeler v. Heath*, 11 Wend. 478; *Van Rensselaer v. Jewell*, 2 N. Y. 135; *Selden, J., in McMahon v. N. Y. etc. R. R. Co.*, 20 Id. 463; *Adams v. Fort Plain Bank*, 36 Id. 255; *McIlwaine v. Wilkins*, 12 N. H. 474; *Mote v. Chicago etc. R. R. Co.*, 27 Iowa, 22; and the principal case carries out this doctrine. So interest is recoverable upon an attorney's account from the time it is rendered to the client: *Mygatt v. Wilcox*, 49 N. Y. 306. In *M-Collum v. Seward*, 62 N. Y. 316, it is held that in an action upon an un-

liquidated demand, the allowance of interest from the time of the commencement of the action is proper. So in *Gammell v. Skinner*, 2 Gall. 45, it is held that a demand of payment of an unsettled claim for wages being equivalent to the rendering of an account entitles to interest from such demand, as then the debt is liquidated, due, and payable.

**INTEREST IN DISCRETION OF JURY.**—Interest is recoverable as a matter of law, where it can be claimed by way of contract, or as damages which the party is legally bound to pay for the detention of money or property improperly withheld; but where it is imposed to punish negligence, tortious, or fraudulent conduct, it is a question within the discretion of the jury: *Sedgwick on Damages*, 374; *Dana v. Fiedler*, 12 N. Y. 40; *Vandervoort v. Gould*, 36 Id. 639; *Fasholt v. Reed*, 16 Serg. & R. 266; *Amory v. McGregor*, 15 Johns. 24; *Hinckley v. Beckwith*, 13 Wis. 31; *Dow v. Dey*, 3 Wend. 356; *Young v. Singleton*, 6 J. J. Marsh. 316; *Stark v. Price*, 5 Dana, 140.

In general, in actions *ex delicto*, it is in the discretion of the jury to allow interest by way of damages: *Walruth v. Redfield*, 18 N. Y. 457; *Buford v. Fannen*, 1 Am. Dec. 615. In cases of unliquidated damages, though the jury may, according to their discretion, take into account interest as part of the damages, yet they cannot give it as interest *eo nomine*: *Ancrum v. Sloane*, 2 Spears, 594; *Hull v. Caldwell*, 6 J. J. Marsh. 208; *Dotterer v. Bennett*, 5 Rich. 298. Thus, where in an action for the wrongful sale of real estate the jury found a verdict for a specified sum, with interest from the day of sale, and judgment was entered accordingly, it was reversed, and judgment was entered by the appellate court for the amount of the verdict: *Dozier v. Jerman*, 30 Mo. 216.

In *McIlvaine v. Wilkins*, 12 N. H. 474, Gilchrist, J., gives a careful examination to cases under this head. Here it was held that in assumpsit for goods sold and delivered, the jury should allow interest by way of damages for the detention of the debt, upon the amount they find due, from the time of a demand of payment, if one be proved; or if there be no demand, from the commencement of the suit. After reviewing some cases, the court say: "It is evident from this brief statement of some of the prominent authorities that there is much conflict among them as to the cases where the court *must* allow interest as a matter of law and as incident to the debt. \* \* \* It is said by Mr. Senator Spencer (*Reid v. Rensselaer Glass Factory*, 5 Cow. 587), and it is undoubtedly true that much of the difficulty upon the subject of interest, has arisen from the confusion and mingling of those cases where the court *must* allow interest with those where the jury may allow it."

Under statutes in some of the states, the jury are authorized to allow interest on unliquidated accounts where there has been a vexatious delay of payment, or the money has been retained without the owner's knowledge, as in Indiana: *Hawkins v. Johnson*, 4 Ind. 21. And whether interest should be allowed in such case is a question for the jury, and the supreme court will not interfere with their verdict unless it clearly appear that they have abused their discretion: *Rogers v. West*, 9 Ind. 400; and see *Illinois Central R. R. Co. v. Cobb*, 72 Ill. 148.

**INTEREST AGAINST FIDUCIARIES.**—On the principle of interest being chargeable for wrongful use or detention of money, certain parties having fiduciary relations, as partners, executors, agents and trustees, are held liable for interest. The liability of a trustee for interest, depends upon the money being held or appropriated according to, or in violation of, the purposes of the trust: *Rapelje v. Norsworthy*, 1 Sandf. Ch. 400. The principle is, that a trustee shall not make any advantage to himself out of the trust fund, and that all

profits which he has made, or might, or ought to have made, belong to the *cestui que trust*: *McNair v. Rayland*, 1 Dev. Eq. 517; *Sparhawk v. Buell*, 9 Vt. 42; *Shuttleworth v. Winter*, 55 N. Y. 624; *Ray v. Doughty*, 4 Blackf. 115; *Fox v. Wilcox*, 2 Am. Dec. 433; *Darrell v. Eden*, 4 Id. 613; *Stearns v. Bown*, 1 Pick. 530. The proper rule for determining the liability is to find whether there was an obligation on the fiduciary to pay over the money when received, or if he has failed to account for it at the proper time; as in the cases of factors and agents: *Williams v. Storrs*, 6 Johns. Ch. 353; *Dodge v. Perkins*, 9 Pick. 389; *Ellery v. Cunningham*, 1 Met. 112; *People v. Gasherie*, 9 Johns. 71; *Boyd v. Gilchrist*, 15 Ala. 849; *Harrison v. Long*, 4 Desaus. 111. So in the case of attorneys: *Nisbet v. Lawson*, 1 Kelly, 275; *Chapman v. Burt*, 77 Ill. 337.

The general rule now established is, that administrators or executors are not chargeable with interest, except where they have received interest, or used the money, or retained it unreasonably after they ought to pay it out to claimants, or to account to the court: *Wyman v. Hubbard*, 13 Mass. 232; *Boynon v. Dyer*, 18 Id. 2; *Williams v. American Bank*, 4 Met. 317; *Turney v. Williams*, 7 Yerg. 173.

In 3 *Williams on Executors*, 1844, it is thus stated: "There are two grounds on which an executor or administrator may be charged with interest: 1. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate; 2. That he himself had made use of the money, or has committed some other *misfeasance* to his own profit and advantage." It is considered unnecessary here to state more than some general principles relating to the liability of these fiduciaries. The subject will be found examined in detail in the notes in 3 *Williams on Executors*, 1844 *et seq.*

In relation to partners the rule is laid down that if one partner, without the knowledge or consent of the others, withdraws a part of the partnership funds from the legitimate business of the firm, and fraudulently misapplies it to his own use, interest shall be charged against him for the time that he extracted the money; but if the money was withdrawn with the consent of the other partners, interest shall not be charged, except from the time that an account has been demanded and refused, the party being in default only from that time: *Solomon v. Solomon*, 2 Kelly, 18; *Miller v. Lord*, 11 Pick. 11; *Winsor v. Savage*, 9 Met. 347; *Hollister v. Barkley*, 11 N. H. 502; *Hodges v. Parker*, 17 Vt. 242; *Robbins v. Lanwell*, 58 Ill. 203. Where a partner agrees in writing to exhibit a partnership account on a certain day, and make settlement, and on that day refuses and withholds the books, he is properly chargeable with interest from such day on any balance found against him, on bill for account, up to the date of the first decree: *Scroggs v. Cunningham*, 81 Ill. 110.

**INTEREST ON JUDGMENTS.**—On a judgment, interest is recoverable; but by the common law it cannot be included in the execution; it can only be by a separate proceeding: *Sayre v. Austin*, 3 Wend. 496; *Hogdon v. Hogdon*, 2 N. H. 169; *Watson v. Fuller*, 6 Johns. 233. But in most states the right is given to include interest in the judgment in the execution issued thereon: *Freeman on Judgments*, sec. 441; *Tazewell v. Saunders*, 13 Gratt. 354. Where judgment was entered when the legal rate of interest was six per cent.; it was held that such rate was not to be increased after the passage of an act making seven per cent. the legal rate: *Cox v. Marlatt*, 36 N. J. 389.

**COMPOUND INTEREST.**—Interest upon interest is never allowed, unless in special cases, as where there is a settlement of accounts between the parties after interest has become due, or there has been an agreement for that purpose subsequent to the original contract: *Connecticut v. Jackson*, 1 Johns. Ch.

14; *Van Benschooten v. Lawson*, 6 Id. 313; *Stokely v. Thompson*, 34 Pa. St. 210; *Rose v. Bridgeport*, 17 Conn. 243; *Camp v. Bates*, 11 Id. 487; *Crane v. Hardman*, 4 Duer, 449; *Mueller v. McGregor*, 28 Ohio St. 285.

The case of *Camp v. Bates*, shows when an agreement to pay interest on interest which has become due is valid, and not usurious. It appeared the defendant gave a note on January 1, 1829, payable in two years, with lawful interest. Payment was not demanded at maturity, and nothing was done until February, 1832, when the plaintiff sought the defendant, produced the note, computed the interest, and interest on that interest, and then proposed that if the defendant would allow this compound interest to be added to the principal, and agree that a new note which he proposed to accept should be drawn with interest to commence back to January 1, 1832, and get the defendant's father to indorse, the plaintiff would extend the time of payment until January 1, 1834. The defendant, being then unable to pay and embarrassed, consented to this arrangement. The judge charged the jury that if there was included in the note in suit, the interest which accrued on the note of January 1, 1829, and interest upon that interest as stated, the note would not, on that account, be usurious, unless such agreement was made and such interest upon interest included in the note as a cover, and with intent to obtain more than lawful interest. The plaintiff obtained judgment, and the defendant moved for a new trial on the ground of misdirection. Huntington, J., held the agreement valid, on a very elaborate examination of cases bearing on the subject of compound interest, and his opinion is therefore instructive. We find it highly indorsed in *Rose v. Bridgeport*, 17 Conn. 246, and *Meeker v. Hill*, 23 Id. 577, holding that a promissory note given for compound interest which accrued on other notes is not usurious. The doctrine of these decisions is that the taking of compound interest cannot *per se* be considered usurious, and an agreement to pay it, made after the interest has become due on a contract reserving interest to be paid annually, or at stated periods, is not only legal, but is generally just and equitable, being founded upon a moral and equitable consideration. The language of Huntington, J., is noticeable: "While," he says, "we concede that interest upon interest, except in particular cases, cannot be collected, we do not assent to the doctrine that the debtor is under no moral obligation to pay it. We think he is bound by every principle of sound morality to fulfill a contract into which he has voluntarily entered, to pay interest at the expiration of the time agreed upon; and if he fails to do this, and agrees to pay interest upon that interest, we are not able to discover why a breach of the latter agreement would not be a violation of a moral duty, binding in conscience, and which natural justice and equity require should be performed." Referring to cases, he proceeds: "There is no doubt, an agreement to pay compound interest will, in some cases, be enforced; nor can it be denied that there are cases in which interest will, by the courts, be changed into principal and carry interest. It may lawfully be demanded, upon a special agreement made after the interest has become due, or where a settlement of accounts take place, after it has become due: *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; *Connecticut v. Jackson*, 1 Id. 13. If a trustee convert the trust-moneys to his own use or employ them in his business or trade, he will be charged with compound interest: *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Newton v. Bennett*, 1 Bro. Ch. 359; *Foster v. Foster*, 1 Id. 616; *Raphael v. Boehm*, 11 Ves. 92; *Dornford v. Dornford*, 12 Id. 127. If a partner refuses to disclose the profits of moneys he has overdrawn from the partnership funds, compound interest will be allowed against him: *Stoughton v. Lynch*, 2 Johns. Ch. 209. So, where a trustee has advanced moneys to preserve the

trust property from waste, or to secure the title to it, or to remove a lien upon it, interest upon interest has been allowed to him: *Barrell v. Joy*, 16 Mass. 221. Chief Justice Parker observes: 'The court of chancery, in England, has allowed or disallowed compound interest according to the justice of each particular case.' It is presumed to be charged where it is consistent with the course of dealing between the parties: *Eaton v. Bell*, 5 B. & A. 34; *Ex parte Bevan*, 9 Ves. jr. 223; *Moore v. Voughton*, 1 Stark. Ca. 487; *Newall v. Jones*, 4 C. & P. 124. Numerous other cases might be cited, which establish the doctrine that compound interest will be allowed, under special circumstances, not only where there is an agreement to pay it, but where the demand is resisted."

In a late case in New York, *Young v. Hill*, 67 N. Y. 162, this subject is thoroughly examined. It is here held that compound interest can only be recovered upon some new and independent agreement made after simple interest has accrued, and upon sufficient consideration, or in mercantile transactions, upon a contract implied from the course of dealing or from custom. Where interest has already accrued, the parties may lawfully agree to turn such interest into principal so as to carry interest *in futuro*, and the forbearance will constitute a consideration; but a promise to pay interest upon interest, which is to operate retrospectively, and is supported by no consideration, save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid. Now this is at variance with *Camp v. Bates*, in this, that it denies the sufficiency of a moral consideration to uphold a promise to pay compound interest which is to operate retrospectively. From this position of the court, however, three judges, Church, C. J., Folger and Earl, JJ., dissented. Allen, J., in giving the opinion of the court, says: "Compound interest can only be recovered upon some new and independent agreement, made upon a good consideration \* \* \*. The exacting or reserving of compound interest has not met with favor in the courts, but the right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract made after the interest has accrued and upon a sufficient consideration, is allowed. When, by the terms of an obligation, interest is payable at stated periods, interest upon interest from the time it becomes due, only gives the creditor the usual and legal equivalent for the non-payment of money payable at a day certain, and in some states recovery may be had of interest upon interest under such circumstances without a special contract to that effect. With us it is not allowed. Two propositions are definitely settled by adjudication: First. That an agreement to pay interest upon interest must, in order to its validity, be made after the interest which is to bear interest has become due; and, Second. That it must be supported by a sufficient consideration."

In *Bledsoe v. Nixon*, 69 N. C. 89, interest was allowed on the arrears of interest due on a promissory note, although there was no express agreement; but this is contrary to the doctrine in New York, and to the decisions generally: See *Henry v. Flagg*, 13 Met. 65; *Ferry v. Ferry*, 2 Cush. 92; *Pindall v. Bank of Marietta*, 10 Leigh, 481; *Doe v. Warren*, 7 Greenlf. 48; *Fitzhugh v. McPherson*, 3 Gill. 409.

There are cases where executors and trustees, on the ground of culpable negligence or misuse of funds, are chargeable with compound interest: *Bowles v. Drayton*, 1 Am. Dec. 689; *Hannahs v. Hannahs*, 68 N.Y. 610. To justify the compounding of interest, there must not be merely neglect, but some willful breach of duty, or a refusal to properly account, or a neglect or refusal to make certain investments or disposition of income as directed: 1 Perry on Trusts, sec. 471.

## GRUMON v. RAYMOND.

[1 Conn. 40.]

**GROUND FOR ISSUING SEARCH WARRANT.**—A warrant to search for stolen goods, and arrest the person suspected, should only issue on an oath by the applicant, showing his goods to have been stolen, and that he strongly suspects that they are concealed in a specific place, and stolen by a person distinctly pointed out; and the warrant should specifically describe the goods, place and person, and direct the officer to search such place, and arrest such person only.

**JUDICIAL LIABILITY.**—If the preliminary requisites be omitted, or if the warrant be general, the proceeding is *coram non judice*, and the magistrate who issues the warrant, and the officer who executes it, are liable in trespass to the party injured.

**TRESPASS, vi et armis**, for the unlawful arrest and imprisonment of the plaintiff. It appeared that Grumon, with four others, had been arrested by the defendant Betts, a constable, by virtue of a warrant issued by Raymond, a justice of the peace, at the complaint of one Terrel. The warrant was in these words: "To the sheriff of the county of Fairfield, or his deputy, or either of the constables of the town of Wilton, greeting: Whereas Dunning Terrel, of Wilton, Fairfield county, has this day, by writing under oath, exhibited to me the subscribing authority, his complaint, that at said Wilton, on the first of January, 1813, two bags were feloniously taken and stolen from the complainant, from the house belonging to A. and Z. Raymond, in said Wilton, of the value of one dollar, marked A. C. and M. M., and that several persons are suspected of taking said bags, and that they are concealed at Aaron Hyatt's, in said Wilton, or some other place or house in said Wilton; and said Terrel prays for a warrant to search after and recover said bags, as by complaint appears. These are therefore, by authority of the state of Connecticut, to command you forthwith diligently to search the premises of Aaron Hyatt, in said Wilton, and other suspected places, houses, stores or barns, in said Wilton, for said bags, and also to search such persons as are suspected; and if you shall find said bags and the person suspected, you are to take said bags and arrest the person suspected, and him have forthwith before me, the subscribing authority, at my dwelling-house in Wilton aforesaid, to be dealt with as the law directs. Dated at Wilton, on this first day of January, 1813. Zadock Raymond, justice of the peace." Five persons, including the plaintiff, were arrested, Betts having found two bags at Hyatt's store marked A.

G. and M. M. Upon the hearing before the justice, the warrant was adjudged insufficient, and the costs taxed against the complainant.

Upon these facts the jury were instructed to find for the plaintiff, which was accordingly done; and the defendants moved for a new trial.

*Sherwood, N. Smith and Bissell*, for the defendants. The justice, in issuing the warrant and declaring the complaint to be insufficient, acted judicially, and cannot be held liable in any form of action: 2 Hale's P. C. 150; 2 Hawk. P. C. c. 13, s. 20; 4 Burn's Just. 104; 2 Swift's Syst. 115, 116; *Frisbie v. Butler*, Kirby, 213; *Phelps v. Sill*, 1 Day, 315, 329. The process was regular; yet, if irregular, it was issued by a competent authority, and the officer executing it is not liable. The person making the complaint alone is liable: 2 Swift's Syst. 58, 96; *Parsons v. Lloyd*, 2 Wils. 345, 346; *Samuel v. Payne*, Doug. 360.

*R. M. Sherman, contra.*

By Court, *REEVE*, C. J. That this warrant was such as no justice ought to have issued will be admitted; for it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to search all suspected places, stores, shops and barns in Wilton. Where those suspected places were in Wilton is not pointed out, or by whom suspected; so that all the dwelling-houses and out-houses within the town of Wilton were by this warrant made liable to search. The officer also was directed to search suspected persons, and arrest them. By whom they were suspected, whether by the justice, the officer, or complainant, is not mentioned; so that every citizen of the United States within the jurisdiction of the justice to try for theft, was liable to be arrested and carried before the justice for trial. The warrant was this: Search every house, store or barn within the town of Wilton, that is suspected of having certain bags concealed in it, said to be stolen, and all persons who are suspected of having stolen them. This is a general search-warrant, which has always been determined to be illegal, not only in cases of searching for stolen goods, but in all other cases.

In the history of legal proceedings there is no such warrant to be found as to arrest all suspected persons; for in those general warrants issued by Lord Halifax, as secretary of state, in search of libels, the persons to be arrested were pointed out in

every warrant; but it was to ransack a man's house, and to bring all his books, papers, etc., before Lord Halifax. A number of suits were brought against those employed by Lord Halifax for having executed these warrants; and in every instance the plaintiff prevailed, and recovered exemplary damages by verdicts of the jury; which verdicts were approved by the court; for in all the applications for new trials they refused them. It cannot be said that those cases differed from the present one; that in this case the justice had jurisdiction over theft, and might issue a proper warrant in the case; and having issued an improper one, it is only an error in judgment respecting a subject over which he has jurisdiction, and therefore he cannot be accountable; but that Lord Halifax, as secretary of state, had no jurisdiction over the subject-matter. This is not the case. A secretary of state has power to commit for treason and seditious libels upon a proper warrant: *Rex v. Kendall and Row*, Skinn. 596; S. C., 1 Salk. 347; S. C., 1 Ld. Raym. 65; *Rex v. Wyndham*, 1 Str. 2; *Searcher's case*, 1 Leon. 70, pl. 93; *Yaxley's case*, Carth. 291; *Hellyard's case*, 2 Leon. 175, pl. 213; 2 Hawk. P. C., c. 16, s. 4. And this doctrine was held to be correct by the court who tried the cases: 2 Wils. 288. The ground on which the defendants were held liable was not that the secretary had no jurisdiction in cases of libels against the government, but that he had no jurisdiction to issue such process; for there must be not only a jurisdiction of the subject-matter, but also a jurisdiction of the process. This point was expressly determined in the case of *Martin v. Marshall and Key*, Hob. 63. In a case tried by the mayor of York, the action brought was trespass *vi et armis*. The mayor of York was judge of a court of limited jurisdiction, and issued a process which was illegal. Though he had full jurisdiction over the subject-matter tried, yet the court held him liable; for, say the court, the judge had a limited jurisdiction of the subject-matter tried, but had no jurisdiction of such process as was issued. This doctrine was recognized as correct in *Perkin v. Proctor*, 2 Wils. 386, where the court say there must be jurisdiction of the process as well as of the person and cause.

In the principal case the law knows of no such process as one to arrest all suspected persons and bring them before a court for trial. It is an idea not to be endured for a moment. It would open a door for the gratification of the most malignant passions, if such process issued by a magistrate should screen him from damages. As there is no such process known

to the law as the record presents, no person could be arrested under it. The case, then, stands on no better ground than it would if there had been no process, and a verbal direction had been given to arrest all suspected persons and bring them before the justice. But the magistrate who issued a verbal process to arrest was held liable in trespass; and this is recognized as good law in 2 Wils. 386.

Should it be asked if a justice issues a warrant which has some defect in it, so that the person arrested cannot be held by it, is the justice liable? I answer, he is not, if he aims at issuing a process which the law recognizes, and fails through some oversight or mistake. If he should attempt to issue an attachment against the goods, estate or person of a debtor, and direct the officer for want of property to take the debtor and him have before the court, etc., and it should be so defective as to abate, the justice would not be liable; for he had jurisdiction over that kind of process which he issued. But if he should direct the officer, for want of property, to take the body of the debtor and put him in irons, and confine him in Newgate, he would be liable; for the law knows of no such process. Where there is a want of jurisdiction over the persons, as in the *Marshalsea case*, 10 Co. 70, or over the cause, as if a justice should try a man for murder; or over the process, as in the case cited from Hobart, it is the same as though there was no court. It is *coram non judice*. From the case of *Entick v. Carrington*, 2 Wils. 275, we have the opinion of the chief justice, that if a warrant which is against law be granted, such as no justice of the peace or other magistrate, high or low, has power to issue, the justice who issues, and the officer who executes it, are liable in an action of trespass. And no man can hesitate to say, that the law knows of no such warrant as one to arrest suspected persons without naming them, without any complaint, against any person, leaving it to the officer to suspect whom he pleases, or to arrest every person that any other person suspects.

But there is another point of light in which this subject may be viewed. The justice never had any jurisdiction of the subject-matter. This purports to be a search-warrant for stolen goods; and the law requires that before any justice can have power to issue a warrant in such case, certain requisites be complied with. It is comparatively of modern date that such a warrant could, under any circumstances, issue. In the time of Lord Coke it could not be done: 4 Inst. 176, 177. But it is now allowed under certain circumstances. There must be an

oath by the applicant that he has had his goods stolen, and strongly suspects that they are concealed in such a place; and the warrant cannot give a direction to search any other place than the particular place pointed out. By the complaint on record in writing it does not appear that any oath was made that the bags were stolen; nor that any place was pointed out where they were concealed; both of which were necessary, and without them no warrant could issue. But it is said that from the warrant under the hand of the justice it appears that there was an oath that the bags were stolen, and that they were concealed at Aaron Hyatt's, or some other place. It is true the justice so says; but it will be remarked that he says, "as will appear by the complaint;" and upon examination of that, there is no oath ever made that there was any felony, or any place pointed out where the stolen bags were supposed to be; so that the justice had no jurisdiction over the case so as to issue a search-warrant. But admitting that the warrant under the hand of the justice presents to us correctly the facts, it will not help the defendants; for there is no place pointed out, only at Aaron Hyatt's or somewhere else, which is equivalent to saying that they were somewhere concealed. This would not be sufficient to warrant the issuing of a search-warrant.

If it should be contended that it would authorize the issuing of a warrant to search Aaron Hyatt's, yet it laid no foundation to search any other place, for no other place is mentioned; and notwithstanding this, the warrant directs all suspected places in Wilton to be searched, whether houses, barns or stores; and under a warrant so issued, the plaintiff was arrested. It is no uncommon thing where there is a court of limited jurisdiction, that their jurisdiction depends upon the existence of certain things, and for want of these the court has no jurisdiction; and everything done by the court where these are wanting, is *coram non judice*, and the judge and the officer are in such case liable in trespass to any person who may be arrested by a warrant issuing from the court.

There is a notable case in 2 Str. 993, which fully establishes this doctrine. It is the case of *Smith v. Bouchier*, and others, viz., the vice-chancellor of the university of Oxford, the judge, goaler and party. The question arose upon a custom, that a plaintiff making oath that he has a personal action against any person within the precincts of the university, and that he believes the defendant will not appear, but run away, the judge may award a warrant to arrest him and detain him until security is

given for answering the complaint. On the seventh of August, 1731, the defendant, Bouchier, having the privilege of the university, made a complaint to the defendant Shippen, the vice-chancellor, of a personal action against the plaintiff Smith to his damage one thousand pounds, according to his estimation, and that he suspected that the plaintiff Smith would run away. He took his oath of and upon the truth of the premises, upon which a warrant was granted to the other defendants, who arrested Smith, and kept him in prison eight days for want of sureties. Here, it will be observed, the requisite was, that the plaintiff should swear to his belief that the defendant would run away, whereas the oath was, that he suspected. The court held, that it was necessary, to give jurisdiction to the court, that he should swear to his belief, and because he did not, all that was done was *coram non judice*, and void. The vice-chancellor, judge, officer and party were, therefore, all held to be liable in an action of trespass and false imprisonment.

As in that case there was no jurisdiction without an oath that the plaintiff believed, so in this case there is no jurisdiction without an oath that the bags were concealed in some specific place. As there was no such oath, the justice had no jurisdiction. This case is precisely in point.

When this case is viewed in either point of light the case is with the plaintiff, for although the justice had jurisdiction of the subject-matter of theft, yet he had no jurisdiction over such a process. It was unknown in law and illegal, and could not be issued by any magistrate high or low, as is expressed by Lord Camden, without making that magistrate liable, provided any person was arrested under it. As to the warrant to search for stolen goods, this could in no case be issued, unless certain requisites had been observed, which were not observed in this case, and of course the justice had no jurisdiction in the case. The justice, therefore, was liable to this action, and the officer also who executed it; for although an officer is not always liable when he executes an improper warrant, yet this is in a case where it does not appear on the face of the warrant that it is illegal. It may, for anything that the officer can discover, be legal, and in such case, it is his duty to obey, and to presume that it is lawful. But an officer is bound to know the law, and when the warrant on the face of it appears to be illegal, and he executes it, he is liable to the person arrested. Such was the present case.

This point has for many years, and in many cases, been so decided by the superior court of this state, and the same point

was so decided by the circuit court of the United States, in the case of the sheriff of Hartford county, where a protection was granted by the general assembly to one Huntington to attend upon a petition which he had pending before the general assembly. In the protection it did not appear what the nature of that petition was, though it was, in fact, a petition by him as an insolvent debtor. It was contended that the assembly could not constitutionally grant the petition, and of course had no authority to allow a protection in a case over which they had no jurisdiction. The circuit court decided that the assembly had power to grant the protection; but they also decided, that supposing they had not, yet it did not appear what the nature of the petition was on which the protection was granted; and it might be a petition in chancery which, by the laws of the land, they were a court appointed to decide: Stat. tit. 128, c. 1, s. 6; and the sheriff was not to make any indecent conjectures that it was in a case where they had no jurisdiction, when it might be allowed in a case where they had jurisdiction. The sheriff, then, having executed a process which he was bound to obey, it was admitted by all that he could not be liable; and, also, if it was one which on the face of it was illegal, his duty would have required that he should not execute it.

I am, for these reasons, of opinion that there ought not to be a new trial.

In this opinion the judges severally concurred.

New trial denied.

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See a parallel case as to the requisites of a search-warrant: *Bell v. Clapp*, *post*. As to judicial liability, see *Yates v. Lansing* and note, *post*.

On the point of jurisdiction, this case is affirmed in *Tracy v. Williams*, 4 Conn. 113; *Case v. Humphrey*, 6 Id. 139; *Cutter v. Wadsworth*, 7 Id. 11; *Starr v. Scott*, 8 Id. 484; *Watson v. Watson*, 9 Id. 144; *Allen v. Gray*, 11 Conn. 102; *Bowler v. Eldredge*, 18 Id. 13; *Sears v. Terry*, 26 Id. 280; *Gray v. Davis*, 27 Id. 455.

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## CHALKER v. CHALKER.

[1 Conn. 79.]

**WHEN ENTRY ESSENTIAL.**—Where an estate of freehold is granted upon condition, and a breach occurs, the grantor must make an actual entry or claim in order to revest the estate.

**CLAIM.**—Bringing an action of disseisin is not a claim within the meaning of the law, nor is it a sufficient substitute for an entry.

**WAIVER OF FORFEITURE.**—Where a forfeiture of an estate of freehold upon condition has taken place for non-payment of an annuity, an acceptance by the grantor of the sum due is a waiver of the forfeiture, which if once waived cannot afterwards be claimed.

**ACTION of disseisin.** The defendant, Stephen Chalker, derived title under a deed from the plaintiff, Jeremiah, dated October 25, 1805, which, in consideration of love and affection for Anne, the widow of plaintiff's brother, conveyed the premises to Anne and the children of Anne and Stephen forever, with the following condition: "Provided, nevertheless, and these presents are so conditioned that the said Anne and the children of said Anne and Stephen shall annually pay to said Jeremiah the sum of fifty dollars, during his natural life, but on default of such payment yearly, or annual payment of said fifty dollars to said Jeremiah, this instrument shall be void and of no effect." Annual payments were regularly made up to the year ending October 25, 1808, when payment was not made until October 30, when the plaintiff, Jeremiah Chalker, received the same, as also the payment for the year 1809. In May, 1807, the selectmen of Durham by their instrument in writing, appointed Jabez Chalker as overseer of the plaintiff, to manage the latter's property on and after that date. Jabez accepted the appointment, and on the thirtieth of October, 1808, refused to receive the annual payment for that year then over due, claiming that the lands had reverted in the plaintiff by the terms of the deed.

Pursuant to instruction the jury found for the defendant; and thereupon the plaintiff moved for a new trial.

*Staples*, in support of the motion.

*Hosmer, contra.*

**TRUMBULL, J.** In respect to the necessity of actual entry or claim in order to take advantage of the forfeiture, and revert the estate, it may be proper to inquire what were the rules of common law as to seisin and trespass of land, what alterations have been made in them by the English statutes, and what in this state by our own statutes or practice. In the early periods of English jurisprudence, the want of public registers, the ignorance of forms, and general incapacity of the common people to read or write, were supplied by solemnities, ceremonies, and notoriety in their transactions, and particularly in the transfer of real estate. Lands were aliened by making livery and seisin in public before witnesses. When written forms of conveyance were introduced every practicable solemnity was required. The feoffer affixed his seal to the instrument, and formally delivered it to the use of the feoffee. At a latter period his signature was added, by making his mark or writing his name. Still the deed of feoffment did not convey the land.

It was only in nature of evidence that an actual feoffment had been made. Livery of seisin only could vest the title in the feoffee, and was still equally necessary in all cases wherein actual seisin could be delivered: Lit. sec. 66; 2 Bl. Com. 311. Hence, the distinction between things corporeal, which lie only in livery, and incorporeal rights, which lie in grant, and pass by the delivery of the deed. The mere delivery of a deed of feoffment, without livery and seisin, gave to the feoffee a license to enter, and nothing more; by such entry he held only as a tenant at will. He who gave the deed might turn him out when he pleased, and the land descended to the heirs of the feoffor, in case of his decease before actual delivery made: Co. Lit. sec. 70, p. 57 a. All acts required to be done *in pais* for conveying or confirming an estate must be avoided or annulled by some act of equal solemnity and notoriety. Every assurance, contract or agreement must be dissolved by matter of as high nature: 5 Co. 26 a. An estate of freehold being created by livery, cannot be determined without entry: 3 Co. 65 a. There is a diversity between a condition that requireth a re-entry and a limitation that *ipso facto* determines the estate without any entry. If a man make a gift in tail, or a lease for life, upon condition that if the donee or lessee goeth not to Rome before such a day, the gift or lease shall cease or be void, the estate cannot cease before an entry; for an estate or freehold cannot begin nor end without ceremony: Co. Lit. 214 b; 10 Co. 41 b, 42 a. "Although the words of the condition are that upon payment of the money the estate shall cease, and shall be void, yet the estate shall not be revested in the grantor without claim; for the estate of inheritance cannot be determined by condition without entry or claim:" 2 Co. 53 b. "So if land be devised to a man and his heirs on condition that if he pay not twenty pounds by such a day, his estate shall cease and be void; the money is not paid, the estate shall not be vested in the heir before an entry:" Co. Lit. 218 a. "When an estate is strictly speaking upon condition, in deed, as if granted expressly upon condition to be void, upon the payment of forty pounds by the grantor, or so that the grantee becomes unmarried, or provided he goes to York, etc., the law permits it to endure before the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of condition, and make either an entry or a claim to avoid the estate:" 2 Bl. Com. 155.

By the word "claim," in the foregoing authorities, is intended

such claim as is called in our books continual claim, and is in judgment of law equivalent to actual entry. It is explained by Littleton, sec. 417, etc. This claim has the same effect with, and in all respects amounts to, a legal entry: 8 Bl. Com. 175. In the present case, by the breach of the condition, the plaintiff acquired only a right to re-enter on the land, of which he has never taken advantage. But it is said that these rules of law are obsolete; that freehold estates in England are not now created by livery and seisin; neither were they so created in the time of Lord Coke; that since the statute of Henry VIII. for turning uses into possession, such estates are created and conveyed by covenant to stand seised to uses, by deed of bargain and sale with enrollment, or by the more usual conveyance of lease and release; in all of which cases the freehold is aliened and transferred without livery of seisin; and hence, it is argued, that it may consequently be divested without entry or claim. But that statute does not in any respect alter the nature of freehold estates. It enacts "that when any person shall be seised of lands, etc., to the use of any other person or body politic, the person or corporation entitled to the use, in fee-simple or otherwise, shall from thenceforth stand and be seised, and be deemed and judged in lawful seisin and possession, of such estate to all intents," etc. By this clause the seisin of the trustee becomes the seisin of the *cestui que use*; but it is clear that the trustee must first have the actual seisin before the statute can operate to transfer it to him who has the use. Nor was such kind of transfer unknown to the common law; as if land be leased to A. for years, remainder to B. in fee or for life, and livery of seisin be made to A., B. becomes by that livery seised of the remainder, and the freehold immediately vests in him according to the grant: Lit. sec. 60. Yet in this case, A., the lessee for years, could not hold the seisin of the land, as that is contrary to the nature of his estate, any more than the trustee could continue to hold it, after the passing of the statute. In each case, the lessee or trustee is merely the instrument of conveyance and transfer. The statute has indeed given efficacy to those new forms of conveyance which I have mentioned. In them the covenant, bargain or lease, vests the use, and then the statute vests the seisin and possession in him who has the use by the deed. Hence a conveyance by bargain and sale, or lease and release, is said to amount to a feoffment, to be equivalent to livery of seisin and to supply its place; for where there is already a possession, either derived from a privity

of estate, or vested by the statute, any further delivery of possession would be useless. "It shall be vain," says Littleton, sec. 460, "to make an estate by livery and seisin to another, where he hath possession of the same land by the lease of the same man before:" See Cro. Jac., 604 and 696; 2 Bl. Com. c. 20. Although the statute in this manner transferred the title, and vested the seisin of a freehold, without livery, still an actual entry was necessary to divest it.

The ingenuity of the courts was exercised to invent some equivalent or substitute, that might save the trouble and formality which attended the making of actual entry. This they effected not by varying or discarding any rule of the common law, but by introducing a fictitious process for trying titles in the action of ejectment. In that action, proof of actual entry is still necessary, and indeed so absolutely requisite, that ejectment cannot be maintained for an advowson, a rent, a common or other corporeal hereditament, where no entry in fact can be made; nor in any case where the right of entry is taken away by descent or otherwise: *Newman v. Holdmyfast*, 1 Str. 54; *Herbert v. Laughlyn*, Cro. Car. 492. This proof is obtained by compelling the defendant to confess on record, an actual lease, entry and ouster, neither of which ever existed in fact: See Bl. Com. c. 11. Thus the principle of common law, that no estate of freehold can be divested without entry, has ever been holden inviolable. Such an estate is never revested in the grantor by the mere breach of the condition. The title conveyed is not void, though the deed so express the condition, but is only voidable by an act of the grantor, taking advantage of the condition and repossessing himself of the estate. Until he become in this manner revested, he may, by a subsequent acceptance of the sum due by the condition, or any other equivalent act, waive the forfeiture at his pleasure, and can never take advantage of it after such waiver: Co. Lit. 218 a; Wood's Inst. 182; 2 Bl. Com. 156; Shep. Touch. 150; *Doe d. Lockwood v. Clark*, 8 T. R. 185; *Goodright d. Walter v. Davids*, Cowp. 805; 1 Swift's Supt. 264, etc. But it is alleged that, however these points may be considered in the courts of Westminster, the rule of law is wholly different in this state; that with us, he who has the right of possession is vested with the legal possession, and ownership is equivalent to seisin; that a freehold lies in grant, and passes by the mere delivery of the deed of conveyance; that in this respect there is no distinction between property real and personal; and that these essential alterations have

been brought about by the practice and decisions of our courts, and by a common law or general custom framed and established by ourselves, for our sole use and benefit, and different from the law of any other state or country. It is true, that by reason of the small comparative value of lands at the first settlement of Connecticut, many loose customs were introduced respecting them, which are frequently stated in the preambles of our earlier laws, and occasioned the enacting of a complete code on the subject, establishing the tenures of real estate, the evidences of title, the rules of descent, and the modes of alienation: See our statute book, tit. Lands. In this collection almost every general question respecting them is settled by positive statutes. Where the statute is silent, the case must be decided by the principles of common law. The distinction between the English rule and our own, is thus laid down in the case of *Bush v. Bradley*, 4 Day's Ca. 306.

"Seisin is necessary in their law, and nothing but ownership in ours. We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder, but by the English law actual possession by entry is necessary. We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession, as much as ownership in the other; and whenever the right of possession is lost, all title and ownership are lost." All this is true if we take the word ownership in its strictest legal sense. But it is a mistake to suppose from this that our courts have arbitrarily discarded the rule of common law on this subject; for I hold that in this state we have adhered to them as strictly in all these points as has been done in England, and that every deviation is either directly enacted in express words, or clearly deducible from the legal construction of our own statutes. Our form of deeds for the conveyance of lands in fee is copied from the English deed of bargain and sale, with the addition of covenants of seisin and warranty. By the statute of 27 Henry VIII. c. 16, "No lands or hereditaments shall pass whereby any estate of inheritance or freehold shall be made, or any use thereof, by use only of any bargain and sale, except the bargain and sale be made by writing indented, and enrolled in one of the courts at Westminster, etc., within six months after the date of said writing." Till enrollment nothing except the use passes by the deed, and the freehold is still in the bargainor. But upon enrollment the estate vests immedi-

ately by the statute of uses, without livery of seisin, and the bargainee, by relation, becomes seised from the delivery of the deed. The freehold and seisin in this case passes by the enrollment in connection with the statute: *Bellingham v. Alsop*, Cro. Jac. 52; Co. Lit. 147 b; 2 Bl. Com. 338. In this state the freehold of lands becomes vested, without livery of seisin, by a record of the title or conveyance in the public register of the town in which the lands are situated. This is effected by virtue of sundry statutes. In the year 1667, just after the reception of our charter from the crown and the union of the colonies of Connecticut and New Haven, a statute was passed whereby it was enacted that any person, who then stood possessed in his own right in fee-simple of any houses or lands, and should not be interrupted by the prosecution of any adverse claim before the last of November, 1668, should have power to enter and record the same to himself, his heirs and assigns forever; and the record, attested in the manner therein described, should be a sufficient and legal evidence to every such person for the holding the same firm to him, his heirs and assigns forever: Tit. Lands, chap. 3. Previous statutes were then in force which ordered that all grants, bargains, sales, and mortgages of houses and lands should be recorded in the register of the town, and thereon be sufficient and legal evidence for holding the same in fee. Subsequent statutes use the same expression as to the validity of such records, and declare them to be sufficient evidence to the grantees for holding the lands to them and their heirs and assigns forever: Tit. Town Clerks, chap. 1, secs. 3, 4, 5, 7 and 9.

The operative words of the statute of uses, that such persons as have the use shall stand and be seised and be judged in lawful seisin and estate of the lands, are not more strong and effectual to supply the want of livery and seisin, than the words in ours, that the record shall be sufficient evidence for holding the lands firmly in fee. In this view of the subject, I agree in the proposition that we have adopted all the beneficial principles of the statute of uses. By virtue of our statutes, a grantee in possession, under a deed so recorded, is not liable to be evicted by the grantor, or any other person, but has evidence of his title against all mankind. By settled construction the record is holden equivalent to livery of seisin, and is indeed much preferable in point of certainty and notoriety: 1 Swift's Supt., 213, 307, 308. It was the policy of our ancestors that all titles to real estate should be established by record. Thus when land is

taken and set-off to the creditor by levy of execution, the title in fee is vested by recording in the register of the town, and in the clerk's office of the court whence the execution issued: Tit. Execution, ch. 1. Hence if B. purchase by deed or levy an execution on the land of A., but neglect to record his deed or levy in a reasonable time, and C. make a subsequent levy of a second execution, or without knowledge of the claims of B., purchase the same land and take a deed *bona fide* from A., the original owner, and procure his levy or deed to be fully recorded, the title of B. is forever lost and avoided; not that B. has forfeited his right by laches and negligence, but because it was merely inchoate, and C., who is in equal equity, is first vested with a complete title by record. So the title of an heir to the particular lands to him allotted in the division of an intestate estate is vested in him by recording the distribution in the court of probate: Tit. Estates testate and intestate. Actual entry and possession by the intestate in his life-time is never required in claims by descent; for the intestate, if owner, must by our statutes have been legally vested with the estate to hold to him and his heirs forever, and this title will appear on record. A complete substitute and equivalent is thus furnished for the maxim of common law, *seisina facit stipitem*: See 3 Day's Ca. 210. Our deed of quitclaim is partly copied from what is termed the concord in a fine levied of lands. It cannot take effect as a release unless the grantee be in possession, but is good by way of bar and estoppel, against the grantor and all who claim under him, and in case the grantor had title, it is valid to hold the estate against all persons, upon being duly recorded, in the same manner as a deed of bargain and sale. But we have no statute which aids or affects any title, that must commence and accrue by entry or re-entry. Such are all titles acquired by forfeiture on breach of conditions; they must be judged by the rules of common law, and actual entry or claim is still necessary. I have entered more largely into this subject than I at first intended, because on the fullest re-examination I have had leisure to make, I cannot accede to the position that our real estates lie in grant, or that any other title passes by the mere delivery of the deed, except a title by estoppel against the grantor and his heirs only: See tit. Town Clerks, c. 1, s. 9.

But laying aside all consideration of the necessity of entry or claim, the plaintiff must, on another ground, manifestly fail in supporting his title. Before any act claiming to take advantage

of the forfeiture, he has, by voluntary agreement, accepted of the defendant the annual sum then due, and executed to him his discharge. This acceptance was by law a waiver of the forfeiture; and a forfeiture once waived can never afterwards be claimed by the party. "When a man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim; and also the feoffer and grantor may waive the condition at his pleasure:" Co. Lit. 218 a. Lessor cannot enter for a forfeiture against his own acceptance of rent: 3 Salk. 3. Where the forfeiture is once waived the court will not assist it: Cowp. 805. In estates of freehold on condition, a subsequent acceptance of the sum due, the non-payment of which had caused a forfeiture, is adjudged in law a waiver, in all instances where the party accepting had knowledge at the time of his acceptance that a forfeiture was incurred. Distinctions in case of chattel interests, of the receipt of rent due and recoverable by action of debt, and perhaps some others, may be found in the books, but none that effect the present question: See Lit. sec. 341; Co. Lit. 211 b; Cowp. 243, 803; 2 T. R. 425; 2 Str. 900; 2 Salk. 597. It is finally urged that the charge in the present case is incorrect, for that the plaintiff may maintain his action of disseisin upon the breach of condition and forfeiture, without previous entry, and the service of his writ is a sufficient claim to support it. If the principles above stated be just, this point was not before the court, its decision could not be material to the case, nor a mistake a sufficient ground for a new trial. The plaintiff having waived the forfeiture, by twice subsequently accepting the annual rents, had lost all right to enter on the lands, or make claim by any act or in any manner whatever. Whether, in case he had claimed the forfeiture and refused to accept the payments, he could have maintained this action without previous entry, is the question now stated; and I am of opinion that by the rules of law it must be answered in the negative. Our action of disseisin is often called action of ejectment, but with a considerable degree of inaccuracy. It is a very beneficial process, and supplies the place of every form of action—real, possessory and mixed—for recovering the seisin or possession of lands, if we except the writ of right, which does not lie in this state; and though it comprehends the original writ of ejectment, which was given to a lessor for years to recover possession of his land when dispossessed: See Bl. Com. 201. Yet it has no single

quality resembling the modern English action of ejectment for trying the title, and is wholly unincumbered with its fictions, notices, and rules for confessing lease, entry, and ouster, which never existed in fact, and which we should never admit in practice. In the present case, the defendant was well seised and possessed of the lands under the deed, and had the complete title in fee vested in him, subject only to be divested in consequence of non-payment of the annuity. All agree that it is in the power of the plaintiff to waive the forfeiture. In such case, no new conveyance to the defendant is necessary, for his title still continues vested by the deed. The fee cannot lie in abeyance waiting for the plaintiff to make his election, whether to claim or waive the forfeiture. If he enter on the land and claim it as forfeited, the defendant is thereby divested, and the plaintiff vested anew by his entry, and not before. In all cases where the right or title of the plaintiff accrues upon his entry or re-entry on lands, an actual entry is necessary in order to revest the estate. A confession of lease, entry and ouster in an action of ejectment, is not a confession of any entry sufficient to make out the plaintiff's title, but he must prove actual entry, possession and ouster: *Bac. Abr.*, tit. Ejectments, D.; 1 *Saund.* 310; 1 *Vent.* 248; 1 *Mod.* 10; *Cro. Jac.* 511; 2 *Str.* 1087, etc. It is true that by the statute, 4 George II., chap. 28, in cases for non-payment of rent, the landlord may, without any formal re-entry, serve a declaration in ejectment, and it is enacted that such service shall stand instead of a demand and re-entry; and I think, in order to render the service of a declaration in one action of disseisin, a substitute for an actual entry in cases like the present, a positive statute of this state must be equally necessary, for the common law knows of no such equivalent. For these reasons I am of opinion that the charge was correct, and no new trial ought to be granted. In his opinion the other judges severally concurred.

Edmond, J., having at first expressed some doubts, afterwards declared himself entirely satisfied with the decision.

New trial denied.

## PECK v. SMITH.

[1 Conn. 103.]

**RIGHT IN HIGHWAY.**—After a highway had been laid out and established pursuant to law, the owner of the land conveyed the same with the usual covenants of warranty and seisin, “saving and excepting the said highway.” It was held that the right of soil in the highway vested in the grantee, subject to the right of passage in the public, and that he could maintain trespass *quare clausum fregit*, against a stranger for the continuance of a shop, erected by him on a part of the highway not used for traveling before the conveyance was made.

**TRESPASS** for entering plaintiff’s close with force and arms and for erecting a building thereon. It was agreed that the plaintiff was seised of a tract of land conveyed to him from one Williams, by a deed containing a reservation, “saving and excepting the road or highway, laid out, used and improved, running from the old highway to the bridge over the premises.” It was also admitted that the trespass, if any, was committed on the highway or road as excepted in the deed; that this road had been laid out according to the terms of a certain statute, and had been used as a public highway; that the cellar dug and shop erected were so dug and erected long before the plaintiff’s purchase and upon a portion of the highway, but not on that part used for traveling. The plaintiff owned the land on either side of the highway. Upon these facts the jury were instructed that if the acts complained of were done within the limits of the highway, the plaintiff could not maintain his action. Verdict for the defendant; and motion for a new trial.

*Daggett and Goddard*, for the plaintiff, contended that, as he was the proprietor of the land over which the highway was laid out, he was entitled to recover: *Lade v. Shepherd*, 2 Str. 1004; *Goodtill v. Alker*, 1 Burr. 133; *Harrison v. Parker*, 6 East, 154; *Commonwealth v. Peters*, 2 Mass. 127; *Perley v. Chandler*, 6 Mass. 454 [4 Am. Dec. 159]; *Cortelyou v. Van Brundt*, 2 Johns. 357 [3 Am. Dec. 439]; *Northampton v. Ward*, 2 Str. 1238.

*Gurley, contra.*

REEVE, C. J. The law of highways, if I may so express it, exhibits some singular traits of character, which are not to be found in any other subject. I flatter myself the following view of the subject, so far as it respects the law of England, will be found correct. I apprehend that I can better convey my ideas on this subject by putting cases, than in any other way.

In the first place, I will suppose that the lord of a manor (and the kingdom was once parceled out into manors) should sell a highway through his manor, or, as doubtless was often the case, should give one, or one should be laid through his land in the manner the law then prescribed, no deed to any person of the land covered by the highway being executed; the inquiry is, what would pass to the public by the sale, or gift, or laying out? Nothing but a right of passage for the king and his subjects; and all the rest would remain the property of the lord of the manor as long as the highway continued to be a highway; that is, he would be proprietor of the soil, the trees growing thereon would belong to him, and all mines and quarries underground would be his. If the easement should be injured by his enjoyment of the appurtenances, he must cease from the enjoyment, but whatever could be done to or with them, compatible with the full enjoyment of the easement by the king and his subjects, might be done by the lord of the manor. It is here to be remarked that the public required a right to this easement, although a kind of incorporeal interest without deed. In the second place, I will suppose the lord of the manor should sell his land lying on the east side of the highway to A., bounding him in the highway west, and should sell the land lying on the west side of the highway to B., bounding him in the highway east.

Has the lord of the manor any interest in the highway after the sale? I answer none; for he is no longer proprietor of the land adjoining to the highway. It is the proprietor of the land adjoining to the highway that is then entitled to the highway; if he were not, the benefit of his manor might be lost by the intrusive intermeddling of others over whom he had no control; and as every subject would have an equal right to occupy, it would be a source of much disorder arising from conflicting claims of prior occupancy. Sound policy, therefore, dictated the rule, that the highway should be the freehold of the lord of the manor, as long as he held the land adjoining the highway. But in the present case, the land is sold to others, and the reason why the lord should have any ownership has entirely ceased. The next inquiry is, will the purchasers on each side of the highway have a property in the highway? I answer yes; and for the same reason that the lord of the manor had, in the first case; and they own each to the center of the road. By this it is not intended to assent to the proposition that the proprietors of land adjoining to a highway have an interest in

the highway to the center of the road as they have in their other land subject to the easement. For suppose, in the third place, that the highway had been laid out wholly on the land of B. There are cases where B., the proprietor, may by a writ *ad quod damnum* remove the easement, and the land will wholly belong to B. in fee, free from incumbrance, as it was formerly, and A. would be entitled to nothing in such land. But as long as that land continued a highway, A. would have an interest therein to the center of the road, as well as B. And in this there is no injustice done to B., for he had been paid for the land, or had freely dedicated it to the public; and it was not a reason founded in equity that either A. or B. should have an interest therein, but one founded wholly in policy. If, indeed it was so, that when a road was disused, and ceased to be a road, it vested in A. or B., unless where B. had freed it from the easement by a writ *ad quod damnum*, in which case he repaid the purchase-money, manifest injustice would be done. But the truth is this, when the road ceases to be a road, the land reverts to the public, that is to say, to those who are under an obligation to maintain the road, with power to sell it, and apply the avails to the purchase of new roads. Whilst it is a road A. and B. have the interest in the highway contended for as laid down in 1 Roll. Abr. 392; but when it ceases to be one, it is at the disposal of the public as before stated; for if this were not so, then whenever an old highway is disused, and stopped up, as it is provided by law it may be when a new highway is made leading to the same places as the old one, over more convenient ground, or for the purpose of shortening the road, the land would belong to A. and B., or at least to that one from whose land the old highway was taken. But this is not so. The law expressly provides that the surveyor of highways shall sell the old highway to its full value to some adjoining proprietor who is vested with the fee of the land free from all incumbrances; and if such proprietor does not buy it, he has power to sell it to any person who will buy it; and the avails of the sale are to be applied to the purchase of other highways, without paying anything to the adjoining proprietors for their supposed interest, for they had one only whilst it remained a highway.

Now, this could not possibly be done by any legislature, if there was any title in the adjoining proprietors, other than has been admitted. It is true the legislative power is such that they can take from the adjoining proprietors their lands, and convert them into highways, but in that case the proprietors must be

indemnified for the injury sustained. But no legislature ever claimed that they could take from a proprietor his land, and sell it, and apply the avails to such use as they pleased, without making the least compensation for it. And it is remarkable that the English statute which provides for laying out highways through lands, provides that twelve jurymen shall assess the damages as they think reasonable, not exceeding forty years' purchase for the clear yearly value of the ground, which is the full value of any kind, and also damages for the making of new ditches and fences. The act then provides that upon the damages so assessed being tendered to the owner of the land, he shall be divested of his interest therein forever, saving to the owner, however, all mines, minerals and fossils, and the timber thereon growing. It then proceeds to provide that if the highway should be disused and stopped, because not wanted, it is to be sold, and no compensation to be made to the owner for any right that he has therein, and the avails are to be applied for the purchase of the new highway. It also provides that if the old highway remains open, because there are houses to which it leads, which are not accessible by the new highway, then all minerals, etc., continues to be the property of the adjoining proprietors. From this view of the subject, the proprietors of lands adjoining a highway will be found to own the freehold of the highway, subject to the easement of passing over it as long as it continues such, and no longer; for when it ceases to be a highway legally, those who are obliged to maintain highways may sell it, and apply the avails to purchase new highways therewith, without any further compensation therefor; so that all the highways in the kingdom are a fund if disused, to procure therewith new highways. In other words, the doctrine of the English law, as supported by all the authorities, appears to be this: that the proprietors of lands on each side of the highway have a freehold estate in the highway subject to the easement before mentioned, which freehold estate is of uncertain duration, no time being limited when it shall end, and yet is liable to end, and will cease in the event of the highway ceasing to be a highway. It is then an estate for life; for such is every estate which may last during natural life, and is liable to be determined on some uncertain event; and such estate is a freehold estate.

The inquiry then is, where is the fee? In the view of common sense, it is not necessary that it should be anywhere; and that would be satisfied with a power vested in that community

which is put to the expense of maintaining highways, to sell the highway, and apply the avails to the purchase of new highways; but as the law has a singular abhorrence of the idea that a fee should not be in any person, in compliance with the maxims of law we may consider the ultimate fee of the land to be in that community, and the surveyor of highways, who is vested with power to sell such highway, and apply the avails as before stated, as a trustee to this community to account with them for the avails, and to show that he has applied them in conformity to the trust reposed in him. I believe a thorough investigation of the authorities in the books will satisfy the inquirer that the common law of England is as has been stated; and I see no reason, from anything that I can discover, to conclude that our own law is not in all the important principles here mentioned the same. We have a statute on this subject which informs us that when a highway is disused, as it may be by a judgment of the county court, it shall belong to him who owns the fee of the land. But this throws no light on the subject until we are informed who does own the fee. It cannot mean, I think, that the person from whose highway the land was taken of course owns the fee. This would throw us into the utmost confusion. Very many of our highways were dedicated to the public by the original proprietors more than a century ago. Will the heirs of these proprietors, if such highway is disused, own the highway in fee? Such a narrow strip would be to the proprietor a very inconvenient inheritance, and very destructive to the adjoining proprietors. Such a dedication has always been understood to be an abandonment to the public of the highway with no remaining claim. This I am warranted to say; for no proprietor has ever claimed the fee of the highway; and on the contrary, the public have always claimed a right to a highway that is no longer used as such. This seems to be an universally received opinion, if we can judge from the conduct of the towns in selling such highways. They evidently view them as thieves, and treat them accordingly. And this applies equally well to highways that have been laid out according to the usage in Connecticut. But what is decisive of the question is, that the legislature themselves have regulated this matter, by vesting the public with a right to sell such highways and take the avails. This is what they could not do if on the highway being disused it belonged in fee to its original owner. This proves demonstrably to my mind, that the original proprietor is not of course again proprietor when the highway is disused; for the contrary

opinion has been and now is universally practiced upon. Every town in the state where highways have been laid out that now have become useless as highways, look to those as a fund to defray the expense of laying out new highways; and the conduct of the legislature, as before alluded to, demonstrates that they view the community which must by law be at the expense of maintaining highways as vested with the right to them.

From this view of the subject it will follow that if the common law is our law, and I see no reason to conclude that it is not, then the adjoining proprietors of a highway have a defeasible freehold estate in the highway, subject to the easement of passage; and the ultimate fee of the land is in that community which must maintain highways, and when the highway is disused, have power to sell it. This opinion is in perfect accordance with the case of *Stiles v. Curtis*, determined in this court. In the present case, the plaintiff was proprietor of the adjoining land on both sides of the highway; and had there been nothing else in the case, I could not have hesitated but that there ought to be a new trial, for I believe that the proprietor of land adjoining a highway has a freehold estate in the highway according to the doctrine before laid down. But in this case there is an exception of the highway, in which the grantor, before he conveyed to the plaintiff, had a freehold estate. Does this make any difference? It would, in my mind, if the estate holden by the proprietor in the highway was of such a nature as that he could have excepted it to himself. But this was impossible, for the moment he parted with the land adjoining the highway, he lost his estate in the highway, for this could not be holden by any person but by the owner of the land adjoining to the highway. The exception, therefore, was, for such purpose, nugatory; and there is no necessity of supposing that the owner of the land adjoining had any such intention as to except the highway for himself. The only design doubtless was to avoid all liability on his covenants in the deed.

My opinion, therefore, is that the court ought to advise a new trial.

TRUMBULL and SWIFT, JJ., delivered opinions favoring a new trial.

SMITH, J., was of the same opinion.

INGERSOLL, J. It is contended in this case that the plaintiff is the owner of the soil where the trespass is said to have been committed, subject to the easement of the highway. That this

being the case, the action of trespass brought against the defendant is well founded. It is agreed that in Great Britain land made use of as a highway does not belong to the king, but belongs to the original proprietor whose it was when taken for a highway, or to those who claimed under him; that the king has a right of passage only for his subjects. This principle, it is said, ought to be adopted in this state as being a common law principle. The question is, whether our circumstances are not such as to require a different rule? Or rather, whether ever since the first settlement of this state (then a colony), it has not been universally understood, when lands have been reserved or laid out for highways, that the fee belonged to the public? And whether the practice has not been uniformly to treat such lands as public property in all the laws enacted with respect to them; and also in the course pursued in all cases, where new highways are laid out, and in the management of them, after they have been laid out?

When new townships have been taken up, I believe, it has been the general, if not the universal practice, to reserve lands for highways. The reserving or making of highways has been coeval with the division of land among the proprietors. This reservation, I think, must of course have been to the public; at any rate, it could not have been a mere right of passage over the land of an individual, inasmuch as no individual ever separately owned the land so reserved. As to all the ancient highways, then, it seems to me, there can be no pretense that they are mere rights of passage over the lands of an individual. But it may be said, and in fact is said, that this is a modern highway, laid out over this farm, and that of course it is a mere right of passage. It appears, to be sure, by the case, that this highway has been laid out, according to the statute law of this state, as and for a public highway. Taking it then as a highway laid out over the land of an individual, or rather laid out according to the provisions of this statute, I am of opinion that the land itself is taken for the public. The statute provides that the damages sustained by the person whose land is taken for a highway shall be estimated by the committee appointed to lay it out, and also makes provision for the payment of those damages. The statute indeed does not say that an estimate shall be made of the full value of the land taken, and that payment shall be made accordingly. I believe I may venture to say, however, that the uniform practice has been, to allow the full value to the proprietor, if the highway be considered as not beneficial to him.

Cases indeed occur, where no damages are given to him, on the ground that he suffers nothing, inasmuch as the highway is considered very beneficial to him, more so than the value of the land taken from him. This mode of assessing damages is a practical construction of the statute, and ought to have great weight, if the statute itself be not very explicit on the subject. In the year 1699, it appears by the statute-book, jurisdiction relative to laying out and altering highways, was first given to the county court. Previous to this time, I presume, it was seldom or never practiced to lay out a highway through the lands of an individual proprietor, as there was sufficiency of common lands not taken up for all highways thought to be necessary. Whether there was any statute on the subject, I know not. It must be supposed, when the legislature first took up the business of laying out highways through the land of an individual, the practice of reserving lands for highways, in the first settlement of towns, was taken into consideration, and if those ancient highways were not mere rights of passage, but the soil of them belonged to the public, it was intended that those laid out by virtue of this statute, should stand precisely on the same ground. The practice, also, as has been observed, has corresponded with this idea. Never, I believe, has it been taken into the account in estimating damages, that a right of passage only was taken from the proprietor, and that the full use of the land might come to him again. Indeed, it would be next to impossible, to make an appraisement on this principle. Whether the proprietor would again have the full enjoyment of his land in one year, or never, would be a matter of utter uncertainty. Of course, no rule could be given, by which to make the appraisement.

Again, if the highway should in a few years be discontinued, the proprietor would have his land, and payment for it into the bargain. Further, it has been an established practice for a long time, probably ever since highways have been laid out, to exchange highways for highways, when an old highway has been discontinued, and a new one taken up. This procedure must have been on the ground that the town was entitled to the fee of the land taken up for highways. To make the matter clear that my construction of the law is correct, may be adduced that clause in all city charters, "that the mayor, aldermen and common council are empowered to lay out new highways, streets, and public walks, or to alter those already laid out, and to exchange highways for highways, or to sell highways for the purpose of purchasing other highways, taking the same mea-

ures in all respects as are directed by the laws of this state to be taken in case of highways laid out by the selectmen for the use of towns," etc. Here they are to take the same measures to lay out highways as selectmen take, in the case of towns, and no other. Damages are to be estimated and paid in the same manner, and authority is given to exchange highways for highways. There is no clause vesting the fee in the mayor, aldermen and common council, or in the city, or in any public body, any more than in the case of the selectmen, where highways are laid out by them, and yet having precisely the same authority, they (the mayor, aldermen and common council) are authorized by law expressly, "to exchange highways for highways, and to sell old highways, and purchase new ones," in the same manner as had been practiced by selectmen. These acts of the legislature, as it appears to me, proceed on the ground that when a highway is laid out, it belongs, the whole of it, land and all, to the public. They show what the construction of the statute relative to this subject has been, which, of itself, will, without any aid from the legislature, form a rule of common law for us. The conclusion of the whole is, that in this state, however different it may be in Great Britain, when land is laid out for a highway, the land itself becomes public property, and no individual has any right or title to it, and on this ground there ought to be no new trial of the cause.

But, secondly, supposing the fee in the present case remained in the original proprietor when his land was thrown open and laid out for a highway, still it is not clear to my mind, that this action is maintainable. I am sensible, in thus questioning this right of action, I am setting up my opinion against the opinion of much greater men, and much more able lawyers than I am; and am also questioning the propriety of some decisions in Great Britain, as well as in our neighboring states on this subject. I am well aware the modern decisions in Great Britain have been, that both trespass and ejectment will lie for land in a highway. Indeed, I know not, but it may be now considered as a settled principle in that country that these actions are maintainable in cases of this kind. But the question is, whether there are not certain established principles of law that operate against these actions to the extent to which they have been carried? Whether also these principles must not be given up, or the actions given up? And if so, whether these adjudged cases ought to be considered as precedents for us? In the first place, to take up the action of ejectment.

I presume it will be agreed that the action of ejectment is brought to recover possession of lands unlawfully withheld from the plaintiff. It is an action which gives specific relief. So say all the elementary writers; so say the judges, where giving an opinion as to the nature of this action. So says Lord Mansfield, particularly, in the first volume of Burrow's Reports, page 119. I mention what he says, because he gave an opinion afterwards in a case reported in the same volume, that the action would lie, in which, as it appears to me, possession could not be given. His words are in the above quoted page: "An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter." And again: "Every plaintiff in ejectment must show a right of possession as well as of property." Indeed, on a recovery by the plaintiff, the form of the execution is to give possession as well as damages. Clear it is, then, if you are not entitled to the possession of the property sought to be recovered, you are not entitled to your action. It makes no difference whether the fee be in you or not. If another person has the right to the present possession, you cannot have it, however it may, in a course of time, come to you. This principle so forcibly struck Lord Hardwicke in a case before him at *nisi prius* in the year 1735, that he decided, "that no possession could be delivered of the soil of the highway, and therefore no ejectment would lie for it; and if it was a nuisance the defendant might be indicted." This decision is cited in a case reported in the first volume of Burrow's Reports, from pages 133 to 146, inclusive. In page 140, reference is made to this decision of Lord Hardwicke. In this case in Burrow, however, wherein the above mentioned reference is made, it was expressly decided by the court, to wit: Lord Mansfield and Justices Denison and Foster, that an ejectment would lie for a highway, and that the land might be recovered subject to the right of passage, or, as it is expressed by some of the judges, subject to the easement. They said further, that there was but a loose recollection of the case before Lord Hardwicke; little regard was therefore paid to it. This case seems to have settled the question in Great Britain.

But let us examine the principles—those principles which Lord Mansfield, in page 119 of Burrow, above mentioned, lays down as essential to the maintenance of the action of ejectment. A leading principle is, that the plaintiff is entitled to the possession of real estate, wrongfully withheld from him by the defendant. He brings his action to recover this possession;

and if the action be well founded, he recovers and is put in possession. I would now ask the question, whether in this case determined by Lord Mansfield and his brethren, as above mentioned, the plaintiff could have been put into possession of this highway? Whether he had any right to it, in exclusion of all others? Or whether he had a right to hold it with others? That he could not exclude the public or the king is very clear; and that he could not be upon the land holding or possessing it in any other manner than any other subject might hold or possess it, is to me as clear. He could neither build upon it, plow it nor sow it; because in so doing he would interfere with the rights of the public. In short he was, by its being a highway, entirely excluded from having any foothold on the soil, though the freehold or fee was in him.

"The land," it is said, "may be recovered, subject to the right of passage, or subject to the easement." What is the meaning of these expressions? Is it meant that possession can be given subject to the right of passage? The meaning, I think, must be this, if anything. The object of the action, as has been observed, is to get possession. It is to get possession as well as to ascertain a right; not to ascertain a right merely. But how can this possession be enjoyed subject to the easement? The easement is the right of passage, and an individual possession interferes with this right. One, then, interfering with the other, they cannot exist together. It is not like holding land subject to the better title of another. It is like holding it in opposition to such title. If, then, possession cannot, on legal principles, be given of a highway, the action of ejectment will not lie.

On the ground that the plaintiff in ejectment must be entitled to the possession of the property demanded, it is, that an heir to an estate cannot recover against a disseisor, as long as there is a tenant in dower or by the curtesy in being, who has a right to the present enjoyment. This was determined a few years ago in the case of *Bush v. Bradley*, reported in the fourth volume of Day's cases, from pages 298 to 310. Indeed, this, I believe, is a settled principle, that a reversioner cannot recover in ejectment, where there is a particular tenant for life or for years under him, who has a right to the possession. At the time when this decision in *Burrow*, establishing the doctrine that ejectment would lie for a highway, took place, it was the practice in Westminster Hall, to permit a plaintiff to recover in ejectment when he had not the clear legal title in himself.

That is to say, if a *cestui que trust* should bring the action, the judge would not permit a defendant to set up a legal title in the trustee, as a bar to the recovery of the plaintiff. Nay, they went further, by permitting a plaintiff to recover in ejectment, when at the time of bringing the action there was an outstanding unsatisfied term of the premises, whether the termor were the plaintiff's own trustee or not. So also, if ejectment were brought by a second mortgagee, they would not permit a defendant to set up a legal title in the first mortgagee. A recovery, however, was not permitted, except where the plaintiff avowedly meant to recover subject to the better title of the termor, trustee, or first mortgagee, and where those having the legal estate did not interfere. When this was done, he was permitted to recover and to go into possession, and to hold the premises subject to the term, trust, or mortgage, whichever it was. This was the doctrine of Lord Mansfield, Mr. Justice Buller and some others. But I take it, this doctrine is now exploded, and a plaintiff cannot now recover in ejectment in the courts of Great Britain, unless he have a clear legal title to the estate, and unless, also, he have a right to the possession of it.

An exception may perhaps be made to the rule, where there is only an outstanding satisfied term; or where a mortgagee attempts to defeat the title of his own mortgagor, by setting up title in a stranger; or where, perhaps, the legal estate is in the plaintiff's own trustee. In the second volume of the reports of Durnford and East, from pages 684 to 701, is reported the case of *Doe on the demise of Hodsden v. Staple*, in which it was determined by Lord Kenyon, chief justice, Ashurst and Gross, justices, against the opinion of Buller, justice, that the plaintiff must have the legal title, and a clear right to the possession of the premises, or he could not recover in ejectment. The idea of recovering with a view to disturb the right of another to the possession of the premises, who did not interfere in the suit, was done away. The case was thus circumstanced. The plaintiff was vested with the fee of the land demanded, but a term had been created for the benefit of an annuitant who was then alive, and the plaintiff gave notice that he meant to recover subject to the payment of the annuity. The court laid it down as an unbending rule, that the plaintiff in ejectment must have the legal title, and a right to the enjoyment of the premises demanded, or he could not recover. The only exceptions to the rule, as made by the court, were, the case of an outstanding satisfied term, the case of a plaintiff's own trustee, and that of a mort-

gagor disputing the title of his own mortgagee. This I believe to be the law now in Great Britain. If, then, in ejectment for a highway, it were now a new question there, I see not why the judges would not permit the defendant to say to the plaintiff: "The public have a right to the sole possession of this ground, though you may have the fee." You have not more right to the exclusive possession than I have." "If you get possession of it you will be a tort-feasor, and the public will immediately turn you out of it." It was, to be sure, pretty easy to say, the plaintiff might recover, subject to the easement, after it had been determined that he might recover without having the better title. But even then, it appears to me that the two cases are different. In the one case a recovery is had against a defendant who has no title, and he who has the title, is neither in possession, nor claims to be in. In the other a recovery is had, where those who have no title do claim the possession; and an occupation of the property in dispute by the plaintiff equally interferes with their possession, and their rights, as does the like occupation by the defendant. Thus, as it strikes me, an action of ejectment for a highway, or part of a highway, could not be maintained consistently with plain acknowledged principles of law, if it were a new case now to be decided, and of course that is not maintainable in this state.

But the case under consideration is an action of trespass, and it may be said, though ejectment will not lie, yet trespass will. I am of opinion, however, that as strong objections may be made against the action of trespass, in a case circumstanced as this is, as against the action of ejectment. Here also I must concede as I did in making my observations relative to the action of ejectment, that it is pretty well settled in Great Britain that trespass will lie by the owner of soil for an injury done to it in a highway, and I know not any exception to the rule. When I concede this, it must be understood that for an injury of this kind, it was formerly held in that country that trespass would not lie. In the case of *Durand v. Child*, reported in 1 Bulstrode, 157, it was held that trespass would not lie. The reason given was: "For that when land is dedicated to the service of the public, it ceases to be private property." In the eighth year of the reign of George II., however, in the case of *Sir John Lade v. Shepherd*, reported 2 Strange, 1004, it was determined that trespass would lie. The case was, Sir John Lade formerly owned the property where the trespass was supposed to have been committed, and built a street upon it, which

after that had ever been considered as a highway. The court determined that it was "a dedication of it to the public, so far as the public had occasion for it, which is only a right of passage. But it was never understood to be a transfer of the absolute property of the soil." It was also held in a later case, determined in the 13 George II., by eight judges out of eleven, that "if this action is brought by the owner of the soil for a trespass in a highway, it cannot, on not guilty, be given in evidence that the place in which the trespass is charged to have been committed was a highway." I know not any other cases where the point has been made, and a direct decision had on it. No doubt there have been many decisions of the like kind, considering the point as being settled. As to the case of Sir John Lade, however, perhaps it ought to be observed that, as he himself voluntarily opened a passage over his own land, he might do it on such terms as pleased him. It was competent for him to make it a mere right of passage, and to reserve every other right of the soil to himself. As to the other case it was a divided opinion to make the most of it, if it went to decide the question directly, that the action of trespass would lie by the original owner of the soil for an injury done to a highway.

But it will be observed that the only question decided was, as it appears in Bacon's Abridgment, fifth volume, page 161, that on not guilty, it could not be given in evidence that the *locus in quo* was a highway. Possibly the court meant to decide only that, as the fee of the land, or at any rate, the freehold was in the plaintiff, it was not competent for the defendant, under the plea of not guilty, to avail himself of any circumstances to show that the land was in such a situation as that the plaintiff could not recover. That under the plea of not guilty, nothing should be given in evidence but a clear want of title in the plaintiff. But be the principles of those decisions as they may, as I have before observed, it is now considered in Great Britain as a settled point, that the action of trespass may be brought for an injury done to a highway. But I think, notwithstanding, in this state we ought not to take it for law, that the action is sustained, without examining the principles on which an action of trespass is founded. If those principles will warrant the action, it ought to be sustained, if otherwise, it ought not to be sustained.

It is an essential ingredient in an action of trespass that the plaintiff be in possession of the property at the time of its being taken or trespassed upon; or, at any rate, that he have a right to the possession. If the property be personal, the possession

may be actual or constructive; if real, an actual possession is requisite for the maintenance of the action. On this ground it is, or at least this is one ground, why a reversioner cannot bring his action against any one who enters upon his estate, plows it up, treads down the grass, or does any other injury to it. Every injury of this kind is done to the particular tenant, the lessee, the man in possession. It concerns not the reversioner, who plows his land, who takes the fruit growing on it, or who does any other trespass on it. He has his rent, and the tenant being entitled to the possession and use of the land can alone bring the action for all the trespasses on it. True it is, if anything be done which comes under the denomination of waste, this goes to the destruction of the reversioner's estate, and this being an injury to him, he can have redress, but it must be by an action of waste, not trespass. This action must be brought against the tenant, whether the waste be done by him or a stranger. If it be done by a stranger, the tenant has his remedy over against him. These, then, as I conceive, being the acknowledged principles attached to the action of trespass, let us see how they will apply to the case under consideration.

It will be proper now to attend more particularly to the case under consideration, and to see for what acts, if any, the defendant is liable. By the case stated, the defendant has barely kept possession of the shop and cellar since the plaintiff owned the land. For the building of the shop, digging and stoning of the cellar, I presume it will not be urged that he is liable to the plaintiff. These acts were done before the commencement of the plaintiff's title, and clearly were no injury to him. But indeed, if this using and keeping possession of the shop and cellar had been on the plaintiff's land, unincumbered with any easement or highway, the same would have been an injury to him, and for which damages might have been recovered by an action of trespass. But the land being thrown open, and used as a highway, what injury is it to him that this shop and cellar are there? Or rather, what more injury to him than to any other individual of the community! Is he deprived of any right? Could he have set up the same shop, and dug the same cellar? Suppose the shop had been set up, and the cellar dug in the traveled path, could the plaintiff, as owner of the soil, have recovered damages for these acts? The answer, as it seems to me, is obvious, that in the case put he could not recover damages. I ask then, whether the use of every part of the highway is not as much given up to the public as that of the traveled

path. Every encroachment, in every part of the highway, may be removed. This very building may be abated or removed, as a nuisance, and the defendant may as much be indicted for keeping it there, as if it were in the middle of the path. Where then, I ask again, are the plaintiff's separate rights?

In the sixth volume of Massachusetts Term Reports, page 456 [4 Am. Dec. 159], Chief Justice Parsons, speaking of the rights which the owner of lands taken for a highway has in or to such, says: "Every use to which the land may be applied and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim." And though he agrees to the principle that the owner may maintain both trespass and ejectment for injuries to his land incumbered with a highway, yet I think an inference may be drawn from what he says, as above stated, that trespass would not lie in the case under consideration. "Every use to which the land may be applied, etc., consistently with the continuance of the easement, the owner can lawfully claim." The inference is, as it appears to me, that "every use to which the land may be applied inconsistently with the continuance of the easement, the owner cannot lawfully claim." That the keeping up of this shop, and having this cellar dug in the manner as the case states, are acts inconsistent with the continuance of the easement or highway, I think is undeniable. I have put the case of a reversioner not being able to recover for a trespass on his estate, supposing it to be apposite to the point in question. I think it is so in a good degree. The reversioner cannot recover, because he is out of possession, and because the present beneficial use of the land is in another. The plaintiff in like manner is out of possession, entirely so, for the purpose of building on the land, or digging a cellar on it. The public is in possession for occupancy, and for every useful purpose.

The ground of an action of trespass is to recover damages for an injury done to the plaintiff, and always implies that by the trespass he suffers a wrong, or is deprived of a right. Take the case of a reversioner; whatever trespass is committed on his land, if it do not amount to waste, it injures not him. All the profits of the land for the time being belong to the particular tenant. He alone has a right to use the land as pleases him, or in such manner as it has been used by the trespasser. In short, as it strikes me, a just criterion to determine whether the plaintiff can do the acts which have been done by the defendant. When I now speak of the action of trespass, I mean of

trespass on land. This rule I think will hold in every case short of waste. If a man plows or feeds my land, in my use and possession, or treads down my grass, he does that which I alone have a right to do. If I have no right to do these acts, I cannot complain that he has deprived me of a right; consequently I cannot complain that he has done me a wrong.

Apply these principles to the present case. Has the plaintiff a right to occupy this house and cellar in the manner in which they have been occupied by the defendant? The answer is at once, no. By so occupying them, he would infringe on the rights of the public. For so doing he would be indicted as for an offense, not to say, that an action of ejectment would be in favor of the public to turn him off. Indeed there is no need of the action in favor of the public, as the shop may be taken down or removed off, and the cellar be filled up, on the ground of their being nuisances. When the land of any person is inclosed, it may be fed by cattle not his own. It may be traveled over by other people, and it is not in his mouth to say, why is this done, or why do ye so? In like manner, if it be taken for a highway, it may be thus fed and thus traveled on. Why may these things be done? For this plain reason, inasmuch as the public has taken it, his separate rights of feeding it, and of traveling across it, are gone; they cannot be enjoyed. So, also, by its being thus taken, his separate rights of keeping a shop and cellar on it are in like manner gone. How it might be as to mines under ground, with which the public has no concern, I do not pretend to say. Though indeed I might say, if the highway be but a mere right of passage, the mines would belong to the owner of the soil, as his separate property, and for violating this property trespass would lie, as in all other cases of the violation of property. Neither do I pretend to say, but the proprietor may have an action of trespass for cutting down trees on it, and carrying them away, provided they are not needed by the public. These cases stand on a different ground from the case under consideration. It will be enough, however, to determine them when they shall come up. Sufficient is it for the present, to determine the case we now have.

One word further, if this action be sustainable for every load of wood, every log, every cart, plow or other instrument of husbandry laid upon the highway, which would be highly prejudicial to individuals, as well as totally overturn what has always been considered as the law on this subject. These are

my reasons against granting a new trial, going on the ground that the highway is but a mere right of passage. These reasons are to me conclusive; not so perhaps to any one else. There are opinions of great men against me, at least as to some things I have advanced. But as it is a new question with us, I thought proper to take up the case on principles, and on principles not having any precedents binding on us, on the subject, it is my opinion, the action of trespass will not lie, and therefore would not advise a new trial.

BALDWIN, J., concurred.

BRAINARD, J., was of opinion that neither ejectment nor trespass could be maintained by reason of the exception of all interest in the land, in the deed from Williams, and on this ground thought the charge correct.

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The doctrine of this case is affirmed in *Watrous v. Southworth*, 5 Conn. 310; *Chatham v. Brainerd*, 11 Id. 82; *Wooster v. Butler*, 13 Id. 315; *Read v. Leeds*, 19 Id. 187. In the opinion of Carpenter, J., in *Taylor v. Public Hall Co.*, 35 Conn. 434, he says: "In the first place, the title to the land within the limits of the highway was in doubt. It was supposed that the common law vested it in the adjoining proprietors. This was doubted by some, and many claimed, even if it was so, that the common law in this respect was not applicable to the circumstances of this country. The prevailing opinion, however, seems to have been that not only an easement, but the absolute title in the highway, vested in the public; and it was not until 1814, in the case of *Peck v. Smith*, 1 Conn. 103, that it was fully settled that the title to the highway vested in the adjoining proprietors. Even in that case the court was divided, some of the judges holding that the fee of the highway was in that community on which was the burden of maintaining the highway."

Its authority is indorsed in *City of Cincinnati v. White*, 6 Peters, 442.

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## BOOTH v. STARR.

[1 Conn. 244.]

**RIGHT TO RECOVER ON COVENANTS OF WARRANTY.**—Where there have been several conveyances of land with covenants of warranty, and an eviction of the last covenantee, an intermediate covenantee, who has not been damaged, is not entitled to recover against a prior covenantor.

**BILL in equity.** The defendant's intestate, John Booth, had conveyed to the plaintiff a tract of land, with covenants of seisin and warranty. The plaintiff transferred the same to others, and after several conveyances the property came into the possession of one Williams, who was evicted by a paramount title. The question in the case was, whether the plaintiff, who had not been

damnified by the eviction, was entitled to a recovery against the covenantor. The court having decreed in his favor, a motion for a new trial was made on the ground of error.

*N. Smith and Bristol*, in support of the motion, contended that the plaintiff, having conveyed his interest in the lands, was not entitled to recover on the warranty until he had been damnified, and had thereby been reinvested with his original right: 1 Chit. Plead. 3, 11; Shep. Touch. 198; Co. Lit. 384 b; *Spencer's case*, 5 Co. 17, 18; Bull. N. P. 158, 159; Com. Dig., title Covenants, B.; *Beely v. Purry*, 3 Lev. 154; *Walker's case*, 3 Co. 22, b 23, a. b.; Com. Dig., tit. Debt, D.; *Waldron v. McCarty*, 3 Johns. 471; *Korts v. Carpenter*, 5 Johns. 120.

*R. M. Sherman, contra*, urged that, though a right of action passed with the land to the assignee, yet the privity of contract remained with the grantor, and he may bring *warrantia chartæ* immediately upon the eviction of the tenant, without waiting for an action to be brought against him: Jacob's Law Dict., tit. Warrantia Chartæ; F. N. B. 298, 299; *Griffith v. Harrison*, 1 Salk. 196, 197; *Abbots v. Johnson*, 3 Bulst. 233; *Broughton's case*, 5 Co. 24; 1 Saund. 241, c, Wms. ed.; *Filley v. Brace*, 1 Root, 507; *Bickford v. Page*, 2 Mass. 455, 459.

SWIFT, J. The question is, whether in the case of a covenant warranty annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor without having been sued by, or satisfied the damages to the last covenantee, who has been evicted. A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors, but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant, for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred. As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenantee and assignees, it follows of course, that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignee, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the various parties to a covenant real, continue notwithstanding a conveyance of

the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it.

It has been contended that a covenant real, like the land, passes by the assignment of the land from the grantor to the grantee, and is thereby extinguished, and the grantor divested of it, so that he can maintain no action for a breach subsequent to the assignment, though it is conceded that the covenant is revived in favor of the assignor by satisfying the damages for a breach of it. But the grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate, the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor, and all prior grantors; but this does not take away the right which his immediate grantor had to look to his grantor and all prior grantors for indemnity, in case of a breach of the covenant, subsequent to the assignment, for which he is liable to pay damages. It cannot be said that the covenant is extinguished by the assignment of the land, and then revived by being subjected to pay damages for a breach of it. If the covenant be once extinguished, it cannot be revived without the consent of both parties; and the circumstance that the assignor on being compelled to pay damages for a breach of it to a subsequent assignee may maintain an action against his assignor, proves that the contract continued in force, and did not become extinguished by operation of the assignment.

To prove that the assignor cannot sue for a subsequent breach, 1 Chitty on Pl. 10, has been relied on, where it is said an assignor cannot sue for a subsequent breach of a covenant running with an estate in lands, but the assignee must sue. This doctrine cannot be true to the extent contended for, as it would prove that the assignor, after having paid the damages to his assignee, could not call on his assignor, though it is conceded in such case he could maintain an action. But to understand the meaning of Chitty, we must examine the authority to which he refers: 1 Saund. 241, c. (Wm. edit.) It is there stated "that the lessor cannot maintain an action of covenant after he has parted with the reversion, for any breach of covenant accruing subsequent to the grant of the reversion; for the statute of Henry VIII., has transferred the privity of contract, together with the estate in the land, to the assignee of the reversion." Thus, if one should lease land, and the lessee covenant to pay rent, or do particular acts on the land, and the lessor assign his interest in the reversion, then the statute of 32 Henry VIII., transfers

the privity of contract, and the assignee of the reversion can only maintain an action against the lessee for a breach of his covenant subsequent to the assignment; for he has the privity of contract and estate, and he only can be damnified by the breach of covenant on the part of the lessee.

But suppose a lessor makes a lease with a covenant of warranty, and the lessee assigns his interest in the estate; after which his assignee is evicted and recovers damages against him for the breach of the covenant of warranty; it will not be pretended that in this case the lessee, who has now assumed the character of assignor, cannot maintain an action against his lessor on the covenant of warranty, though the breach happened subsequent to the assignment. The case there stated in 1 Saund. 241, c, must have related to covenants to be performed by the lessee, and must be understood to mean that the lessor cannot bring an action of covenant against the lessee after he has parted with the reversion for any breach of covenant accruing subsequent to the assignment, which is a correct principle. It cannot mean that an assignor cannot sue for a subsequent breach; for this in many instances cannot be correct. The authority then relied on has no application to the point in dispute; and I apprehend the position is undeniable, that in all cases where there have been sundry conveyances of land, with covenants real annexed to them, all the covenants between the parties continue operative notwithstanding such conveyance, and every one when damnified can maintain an action.

In the present case, the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances he can maintain this action against this defendant, who is his immediate covenantor. The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances; yet he can bring no action on the covenant till he is actually evicted; for till then there has been no breach of the covenant, no damage sustained. By a parity of reason, the intermediate covenantee can have no right of action against their covenantors till something has been done equivalent to an eviction, for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenanters, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor, would not

bar suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee, for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant.

In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial; and if the plaintiff in the meantime should become unable to refund the money, the defendant would, by operation of law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages will have a claim for indemnity against a prior covenantor. The nature, then, of the engagement of the first covenantor is to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant. It may be proper, then, to examine what is necessary to give the surety a right of action against the principal. It would seem to be a clear dictate of reason that the mere liability to pay money for another, he continuing liable to pay the money himself, can never be a cause of action in the contract of indemnity; for it is uncertain whether the surety will ever be compelled to pay, and the principal may pay himself. Such uncertainty can be no ground of action. It is not necessary that actual payment should be made. If a suit should be brought, judgment rendered, or the person imprisoned, it will be sufficient, but mere liability, without any damages, is not.

On this point no doubt could be entertained were it not for the decision in the case of *Filley v. Brace*, 1 Root, 507 [see note, 1 Am. Dec. 47], where it is distinctly laid down that mere liability, without any damage, is sufficient cause of action. In

examining this question it may be premised that there is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge or acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless: 1 Saund. 117 n. (1 Wms. edit). In the case of *Filley v. Brace*, much reliance is placed on cases of actions sustained by sheriffs for escapes when they had not paid the debt to the creditor.

The ground is assumed that the liability of the sheriff to pay the debt gives the right of action; but this is an erroneous assumption. The wrong done by the escape itself furnishes the cause of action. The sheriff would be entitled to recover, admitting he was not liable to the creditor. Suppose an escape, and before suit brought the debtor escaping pays the debt to the creditor; this would be no bar to an action; for by the wrongful act of the escape, a right of action accrued to the sheriff, which cannot be discharged without his concurrence, and the payment of the debt to the creditor could only go in mitigation of the damages.

The case of *Griffith v. Harrison*, 1 Salk. 197, is also cited. That was a covenant to be discharged and indemnified from all arrears of rent; and the breach alleged was, that rent was in arrear. The court determined the declaration to be bad, because rent remaining in arrear and not paid is not a damage unless the plaintiff be sued or charged, and if paid at any time before such damage incurred by the plaintiff it is sufficient. This is an unanswerable and conclusive authority to disprove the doctrine it is adduced to maintain. Here the liability to pay the rent is acknowledged; and the court say it is not a damage unless the plaintiff be sued or charged, and if paid at any time before, it is sufficient. So it may be said in the case of *Filley v. Brace*, the debt remaining unpaid is not a damage, unless the plaintiff be sued or charged; if the defendant pays it at any time before the plaintiff is sued, he is not liable. But the court do not seem to rely upon the principal point decided in that case, but on a *dictum*, contained in the report. It is there said that where the counter-bond or covenant is given to save harmless from a penal bond before the condition is broken, then if

the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter-bond forfeited.

This is the precise principle decided in the case of *Abbots v. Johnson*, 3 Bulst. 233, cited in the case of *Filley v. Brace*, as proving the doctrine that mere liability is a ground of action. As these two cases contain but one decision, which is reported at large in Bulstrode, I will examine that authority, and see whether it support the doctrine for which it was cited. That was an action of debt on an obligation, and the case was, the plaintiff was bound in a bond with the defendant for payment of money on a day to come, and had a counter-bond from the defendant for saving him harmless. The defendant paid not the money at the day. Upon this his default, the plaintiff brought his action on the counter-bond. To this the defendant pleaded *non damnificatus*. The plaintiff replied, showing all this matter, and that he requested the defendant to pay this money, which he did not do; on which there was a demurrer. And the question was, whether this non-payment of the money at the day by the defendant be a present forfeiture of the counter-bond, without other damage. The court decided that the failure of payment at the day by the defendant, by which he put the plaintiff in danger of being arrested, was a damnification to him, and a present breach of the condition, and a forfeiture of the counter-bond. Here it must be noted that there was a bond conditioned to pay money at a future day; and the ground of the decision is, not the liability, but the failure of paying the money. When the plaintiff gave the penal bond with the defendant, payable at a future time, no liability to be sued or to pay the penalty existed. When the counter-bond was taken to save him harmless, it was in effect an engagement that he should never be liable to pay the money, or be subjected to the penalty. The failure to pay the money on the bond by the day, rendered the plaintiff liable to pay the penalty; and this was a present breach of the condition of the counter-bond; for by the non-payment of the money, a liability accrued which did not exist before, and this very liability arising from the failure of paying the money at the day was the ground of sustaining the action.

This is very far from proving, that where there is a contract to save harmless from an existing liability such liability is a ground of action. Indeed, the fair inference is, that such liability is not to be deemed a ground of action from the circum-

stance that the court considers the failure of paying the money at the day as the forfeiture of the counter-bond. I apprehend no authority can be found that will support the doctrine laid down in *Filley v. Brace*; and the cases cited in favor of it, directly disprove it.

But let us examine this question on principle. What is the nature of the contract to indemnify and save harmless? It is not that the plaintiff shall never be liable. The existence of the liability is the ground of the contract; and the object of it is to make good to the plaintiff any damage he may suffer by reason of it. This liability, against the consequences of which the contract is to indemnify, cannot be a breach of the contract itself. There must be actual damage arising from it to constitute a breach according to the terms of it. If liability without damage be a cause of action, then the contract is broken the moment it is made, and the defendant may be sued. He may be subjected to pay it to his surety; and as this will be no bar to a suit by the creditor, he may be compelled to pay it again, and then seek his remedy against the surety. The law will not countenance such absurdity and injustice. Nor is there any danger from delay to the surety, for if he suspects that the principal is in doubtful circumstances, he may at any time satisfy the demand; and then he has a clear right of action on the contract of indemnity. This point is equally clear on authority. In all cases where the condition of the bond or contract is to indemnify and save harmless, the proper plea is *non damnificatus*. The defendant may say that the plaintiff has not been damnified; and then it is necessary for the plaintiff to reply, and show the damage, to entitle him to recover. This incontrovertibly proves that liability is not a ground of action; for the plea admits the existence of the liability, and denies the damage; and the reply setting forth the damage shows it to be necessary to constitute a ground of action. Suppose to the plea of *non damnificatus*, the plaintiff should reply the liability only? Will any lawyer say that such reply is good? If not, the consequence is that something more than liability must be shown; and this must always be actual damage.

In this opinion the other judges severally concurred.

New trial to be granted.

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Cited with approval in *Mitchell v. Warner*, 5 Conn. 522, as to the necessity of eviction to constitute a breach of the covenant of warranty. In *Lathrop v. Atwood*, 21 Conn. 126, *Redfield v. Haight*, 27 Id. 39, and *Foster v. Atwater*, 42 Id. 253, it is relied on to show that damage must result before one can maintain the action.

## BARRETT v. FRENCH.

[1 Conn. 354.]

**DEED CONSTRUED AS A COVENANT TO STAND SEIZED**—A husband and wife, in consideration of love and good will, executed a deed purporting to give, grant and confirm certain lands to two of their sons, and to their heirs, with the usual covenants of seisin and warranty, reserving to the grantors the use and improvement of the premises during their lives. It was held that though the deed did not operate as a feoffment, because it purported to convey a freehold *in futuro*, yet it was good as a covenant to stand seized to the use of the grantors during their lives, and after their death to the use of the grantees and their heirs.

**GRANTOR'S DECLARATIONS.**—The declarations of the grantor, made prior or subsequent to the execution of the deed, not made in the presence of the grantee, are inadmissible to invalidate the deed.

**DURESS**—To avoid a deed on the ground of duress *per minas*, the threats must be such as to strike with fear a person of common firmness and constancy of mind. Duress by mere advice, direction, influence and persuasion is not recognized in law.

**EJECTMENT.** The defendants claimed by virtue of a deed from their mother, Anna French, and her husband, William, expressed to be in consideration of love and affection. The plaintiff claimed in right of his wife, another of Anna's and William's children, and an heir at law, alleging that the deed was void as it purported to grant the land to the defendants and their heirs forever, but reserved to the grantors the use and improvement thereof during their natural lives. Plaintiff also averred that the deed was not the free act and deed of Mrs. French, in that she was of weak mind at the time of executing the same, and incapable of making any legal contract; that the deed was not her voluntary act, but obtained from her by the coercion of her husband, and that the deed was obtained from her by fraud and falsehood.

As to the first point the jury were charged that the reservation in no manner impaired the legality of the deed; and as to the remaining questions, the court instructed the jury that "if the grantor, at the time of executing the deed on which the defendants rely was in such a state of derangement, stupidity and mental disability, as rendered her incapable of disposing of her property, and executing a valid deed of conveyance; or if you shall be of opinion that she did not execute the deed as her voluntary act, but was, contrary to her will, compelled to execute it by fear and terror from such coercion and duress as would render her acts void; or that she was deceived by fraud, falsehood, and imposition, and executed the deed under an essen-

tial and material misapprehension and mistake as to its nature, contents, legal operation and effect," you will find for the plaintiffs to recover as tenants in common the defendants, and costs

Verdict for the defendants, and motion for a new trial

*N. B. Benedict*, in support of the motion.

*N. Smith, and R. M. Sherman, contra.*

SWIFT, C. J. In this case, the plaintiffs claimed as heir at law, in right of the wife, to Anna French; and the defendants claimed by deed from said Anna and her husband William French. The deed is in usual form, with a reservation of the use of the land to the grantors during their natural lives. It is contended that this is an attempt to create a freehold estate to commence in future, and that the deed is void. But this mode of conveyance has been practiced in this state from a period beyond memory, and no inconvenience has resulted from it. This constant and immemorial usage is sufficient to make it a part of our common law; and a deed of this description may be deemed one of the common assurances of real estate. Nor was this intended to innovate upon the common law, or impugn the maxim that a freehold cannot be created to commence in future. That originated from the circumstance that livery of seisin was essential to constitute a freehold estate. But prior to the emigration of our ancestors from England, methods had been devised to supersede the necessity of conforming to that regulation.

It is well known that to avoid forfeitures, it was a common expedient to vest the fee of lands in one, to the use of another, and that to counteract this, the statute of the 27 Hen. VIII. was passed, declaring that the fee should vest in him to whom the use was granted. It then became only necessary to convey to the use of one, and the statute transferred the use into possession, and the title passed without livery of seisin. Among the various modes devised was a covenant to stand seised to uses. This is where a man seised of lands in fee, covenants in consideration of blood or marriage, to stand seised of the same to the use of his child, wife, or some other relation. In the construction of deeds, courts adopted the liberal principle, that greater consideration was to be had for the passing of the estate, which is the substance of the deed, than the manner how, which is the shadow; and that a deed should never be laid aside as void, if by any construction it could be made good. Thus, a grant by one seised in fee of lands to his brother, to be

holden after the death of the grantor, with a covenant that he was well seised in fee, and that it should be lawful for the grantee to enter after the grantor's death, and peaceably to hold the same, has been construed to be a covenant to stand seised to the use of the grantee, and pass to the estate: *Roe d. Wilkinson v. Tramnarr*, Willes, 682. So, in the state of Massachusetts, it has been held that a deed from father to son, to have and to hold after the death of the grantor, with a covenant that he was seised in fee, and that he would warrant and defend the premises after his decease to the grantee, his heirs and assigns, was to be considered in law as a covenant by the grantor to stand seised to his own use during his life, and after his decease to the use of the grantee and his heirs: *Wallis v. Wallis*, 4 Mass. 135 [3 Am. Dec. 210]. The deed in question was from a mother, with the assent of her husband, to her sons, expressed to be for the consideration of love and good will; and though it cannot operate as a feoffment, because it is calculated to create a freehold estate after the death of the grantor, yet being between relations, in consideration of blood, it may be deemed to be a covenant on the part of the grantor with her husband to stand seised to their use during life, and after their decease to the use of the grantees and their heirs; and then the legal effect of the deed is that the grantor was tenant for life, and that the grantees had an estate in remainder in fee-simple.

The plaintiffs offered two witnesses, who were tenants in common with them, if they had title to show that the deed was not valid, who were rejected by the court as interested in the event of the suit. Where one tenant in common brings an action of disseisin, and grounds his claim to recover on the common title, he recovers for the benefit of the whole; the possession of one tenant in common, recognizing the title of his co-tenants, is, in legal consideration, the possession of all. Of course, if a tenant in common in such action obtains possession of the land, his co-tenant becomes likewise possessed. In this case the witnesses were called upon to testify in support of their own claim of title to the land; and if the plaintiffs had recovered they would, with the plaintiffs, have obtained possession of the land of which they were then disseised, and could have maintained an action of partition, or of account for the rents of the land. They were, therefore, directly interested in the event of the suit, and were properly excluded. It has been uniformly decided that the declarations of the grantor, when the grantee is not present, prior or subsequent to the execution of the deed, cannot be ad-

mitted in evidence to invalidate the deed. The principles of law relating to the case were correctly stated by the court in their charge to the jury.

In this opinion the judges severally concurred.

New trial not to be granted.

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As to a deed conveying a fee to the grantee, with the reservation of a life estate in the grantor, being supported in Connecticut by force of immemorial usage, if not as a covenant to stand seised, this case is followed in *Fish v. Sawyer*, 11 Conn. 550; *Bryan v. Bradley*, 16 Id. 484; *Bissell v. Grant*, 35 Id. 297; and as to natural love and affection being a good consideration to support a covenant to stand seised, the case is cited in *Horton v. Sledge*, 29 Ala. 497. As to the inadmissibility of the declarations of the grantor made in the grantee's absence, either before or subsequent to the execution of the deed, to invalidate the deed, the principal case is regarded as authority in *Pettibone v. Phelps*, 13 Conn. 450; *White v. Wheaton*, 16 Id. 535; and as to the necessity of showing the participation of the grantee in the fraudulent intent of the grantor, to render the deed void, this case is cited in *Partelo v. Harris*, 26 Id. 482; *Sisson v. Roath*, 30 Id. 17. Further reference is made to this case in *Clark v. Vaughan*, 3 Conn. 193; *Phillips v. Medbury*, 7 Id. 572, and *Kealey v. Hammer*, 18 Id. 316, on the point, that one of several jointly interested in an estate may sue and recover against him who has no title.

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## SHEPARD v. HAWLEY.

[1 Conn. 337.]

**NOTICE TO JOINT INDORSERS.**—Where a note or bill is made payable to two or more, not partners, and by them jointly indorsed in their individual names, each must have notice of non-payment.

**EVIDENCE OF FRAUD IN OBTAINING NOTE.**—It is competent for the defendant, in support of his defense to an action on a promissory note, to show that the note was given to the plaintiff in consideration that he would surrender certain accepted drafts of the defendant in plaintiff's favor, and that after receiving the note, plaintiff refused to deliver up the drafts until a partial payment had been made thereon, the acceptances erased, and a receipt in full had been given to the acceptor.

**ASSUMPSIT** against the defendants as indorsers of a promissory note. The note was made payable to Loomis and Hawley, and by them indorsed. The defense set up was want of notice, and fraud in obtaining the note. The only proof of notice of non-payment, was a written acknowledgment by Loomis that he had received such notice; and defendants contended that notice to one of two joint indorsers was not sufficient. The court ruled, however, that the notice to one was good against all the joint indorsers. The evidence offered to show fraud was, that Loomis had given this note to plaintiff for a debt due the latter, and

for which plaintiff held Loomis's accepted drafts; that it was agreed that plaintiff should return the drafts with their acceptances to Loomis upon the receipt of the note, but that plaintiff refused to so deliver the drafts after having received the note, and retained the same until payments were made thereon by the acceptor and acknowledged in writing by plaintiff; that plaintiff afterwards offered to return the drafts to Loomis with the acceptances erased, when the latter refused to take them. Evidence of these facts was rejected, except so far as the same tended to show that payment had been made on the drafts, which payment, the court ruled, should be applied in satisfaction of the note.

The plaintiff obtained a verdict. and the defendants moved for a new trial.

*E. Huntington*, in support of the motion. One joint tenant, or one jointly interested with another in any property cannot bind the other by any act unless it is for the latter's benefit: *Rad v. Tucker*, Cro. Eliz. 808; *Right v. Cathell*, 5 East, 494, 498; 3 Bac. Ab. 690; Chitty on Bills, 32. The facts stated on the trial were relevant, and evidence to support them ought to have been received.

*T. S. Williams and J. Trumbull*, contra, as to the first point, cited *Carvick v. Vickery*, Doug. 653, 654, n; *Alderson v. Pope*, 1 Camp. 404, n; 3 Com. Dig. tit. Condition, L, 9; 5 Com. Dig. tit. Pleader, C, 61; *Whitcomb v. Whiting*, Doug. 652; *Smith v. Ludlow*, 6 Johns. 267; 2 Saund. 64, b. n. On the second question, counsel contended that the plaintiff's right of action on this note could not be prejudiced by any subsequent transactions relative to the drafts. For a violation of plaintiff's contract relative to the drafts, Loomis had his remedy.

SWIRT, C. J. In this case it is contended that the joint indorsement of a negotiable note, payable to two or more promisees, constitutes the indorsers partners in that transaction, and that notice of the non-payment of the note to one, is notice to both, as in the case of partners. The only authority to this point is the case of *Carvick v. Vickery*, Doug. 653, 654, n. It is true there the court of king's bench granted a new trial on that ground; but on the trial of the cause, Lord Mansfield permitted the defendant to prove the usage, and the jury declared they knew the usage to be otherwise, and found a verdict accordingly. This case, then, cannot be considered as an authority; and we are at liberty to settle the question on principle. Where there

are two or more promisees in a negotiable note, it is necessary that each should indorse it, in order to transfer it; but such joint act, from the nature of the thing, can no more constitute them partners than any other joint transaction. The legal effect of such indorsement is to make them all liable to the indorsee on failure of the payment of the note, if due notice is given to them, but there is no reason for saying that such an act amounts to an agreement that they will be liable as copartners with respect to notice; for this is to extend the terms and nature of the contract. Such construction ought not to be given to a contract, if it be unnecessary; for it may subject the parties to inconvenience. In the case of partners, as all have a joint interest, notice to one is sufficient; for he may withdraw the effects of the company, and pursue all the remedies to which they are entitled; but where they are merely joint indorsers, no copartnership actually existing, each may have a separate interest, both as to withdrawing effects and pursuing legal remedies. The consequence then might be that by giving notice to one indorser only, the others might lose their claims against those that are liable to them. Cases also may occur where the liability on the indorsement has been discharged by want of due notice, or some other laches, yet one of the indorsers who may be a bankrupt will have it in his power, by his acknowledgment of notice, to revive such extinguished liability, without the knowledge or consent of those who are thus rendered chargeable. This can easily be avoided by requiring notice to be given to all the joint indorsers to whom the holder of the note intends to look, and then every one can protect his separate rights.

The defendants also contended that the plaintiff obtained the note by fraud, and offered testimony to prove the fact, which the court rejected as irrelevant. The facts stated constituted a fraud, the evidence offered was pertinent to prove them, and it ought to have been admitted.

In this opinion TRUMBULL, SMITH, BRAINARD, and BALDWIN, JJ., severally concurred.

GODDARD, J. I am of opinion that the direction to the jury was wrong. If the principle laid down is correct, it must be applied to all cases where by the law-merchant notice of the dishonor or non-payment of a bill of exchange or promissory note is necessary. This rule, if adopted, it is obvious, may open a door to fraud, and create or continue responsibilities, which parties never meant to assume. A negotiable bill or note hav-

ing been dishonored, and due notice having been given, a right of action has accrued to the holder, and he may then hold the note or bill for an indefinite time without enforcing his demand by suit.

A. and B. are joint promisees in a note. They indorse it to C. Payment is refused when at maturity. A., who is the friend of C., is embarrassed for funds. Notice is given to him, but no notice is given to B., who is responsible. C. is content to suffer his money to remain on interest; and out of favor to A., he neglects to collect his money until A. fails. He then commences his suit against B. without notice, and collects his debt after a lapse of years, during which time B. has supposed that the bill or note has been paid at maturity. B. may have had funds in the hands of the drawee to pay his part of the bill or note, which he has failed to collect, supposing they had been applied to the payment of his bill or note. Prior indorsers who would have been liable to him have not been notified, and he has lost his claim on them. Or, if no notice was ever in fact given, and he had been discharged from the claim, it is in the power of A., who has become bankrupt, to revive or create a claim against him, by acknowledging that notice had been given to him. A principle so dangerous ought not to be adopted, unless settled rules of law imperiously demand it.

I have not been able to find any decision which supports such a principle. I find principles opposed to it. What is the object of requiring notice? To enable the drawer or indorser to withdraw his effects, which in contemplation of law are in the hands of the drawee; to enable the indorser of the note to obtain payment of the maker; to notify others who may be liable to him. It is always presumed that the maker of a bill has effects in the drawee's hands, and that the indorser has given value for it, and that each may sustain a loss by want of notice. It is on this principle that notice is required: *Bickerdike v. Bollman*, 1 T. R. 410; *Vere v. Lewis*, 3 Id. 182; *Whitfield v. Savage*, 2 Bos. & P. 280, 281; *Chitty on Bills*, 162. In the case of *French v. The Bank of Columbia*, reported in 4 Cranch, 154, Chief Justice Marshall, in delivering the opinion of the court, says: "Why is it that notice must immediately be given to the drawer, that his bill is dishonored by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice, not

merely as an indemnity against actual injury, but as a security against a possible injury which may result from the laches of the holder of the bill. To this security, then, it would seem the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule."

It is apparent that none of these ends of notice are attained by notice to one only of two or more joint indorsers or drawers. But the principle contended for is attempted to be maintained by considering joint indorsers or drawers as partners *quoad hoc*. To constitute a partnership there must be either an agreement to share in profit and loss, or two or more must hold themselves out to the world as partners. The case in question does not state the defendants to be partners by any such agreement. Have they held themselves out to the world as partners? There is nothing on the face of this note, or the indorsement, which has any tendency to hold out to the world such an idea, and I believe it is against the universal sense of the mercantile world so to consider them. Partners usually transact business under some name. This note is payable to Asahel Loomis and Samuel Hawley, and by Asahel Loomis and Samuel Hawley indorsed. In cases of actual partnerships, it is said that he who draws, accepts or indorses a bill for himself or partner, should always express that he does so for himself and partner, or it will be doubtful whether his partner is bound. Chitty on Bills, 35, and the following cases there cited: *Pinkney v. Hall*, 1 Salk. 126; S. C., 1 Ld. Raym. 175; *Smith v. Jerves*, 2 Ld. Raym. 1484; *Carrick v. Vickery*, Doug. 653; *The King v. Wilkinson*, 7 T. R. 156; *Meux v. Humphry*, 8 Id. 25; *Lepine v. Bayley*, 8 Id. 325. If several persons employ one factor, and he draws a bill on them all, the acceptance of one will not bind the rest: Bull, N. P. 279; Chitty on Bills, 345. But the case of *Carrick v. Vickery*, Doug. 653, n., is relied on as authority to support this case. In that case John Maydwell, and his son, John Maydwell, drew a bill on Abraham Vickery, payable to their own order, and the son only indorsed it thus: "Jn. Maydwell." In an action by the indorsee against the acceptor the court of king's bench decided that the indorsement was good, and said that it was better that the father should suffer by the act of the son than that the world, who would collect the condition and relation of the parties to each other from the face of the bill itself, should be deceived by it; and Lord Mansfield, to maintain the position he had taken, denominated the promisees in that case partners to that particular transaction, although the case stated

that they had no other connection in business than the drawing of that bill. But it is remarkable that in the trial of that very case afterwards Lord Mansfield, upon objection, admitted evidence to prove that by the universal custom and usage of merchants and bankers, such indorsement was held to be bad; and the jury *una voce* said they wanted no evidence to prove that; they knew it to be as stated; and gave a verdict for the defendant. Let it be remarked that the rule established by the court was for the benefit of the trade, founded on the supposed law-merchant, and opposed to the general doctrine of the common law that one tenant of a personal chattel can do no act to affect his co-tenant.

But it is said, that admitting one joint promisee cannot indorse for himself and the other, yet that having done so, he shall be responsible for all the consequences of this last joint act; and on this ground notice to one ought to be considered as notice to both. I answer, that if one cannot indorse for both by the law-merchant, they are in no sense partners. They are not supposed to have drawn upon the credit of joint funds; they have not held themselves out to the world as partners; the holder has not been deceived; their acts have had no tendency to deceive the world. The holder will know that they may draw or indorse upon the credit of separate funds, and will perceive the importance of notice to each to enable each to secure himself in relation to others, and to have all the security to which he is entitled by law. But it is said, that if a promise is made to several persons to pay on request, a request to one is sufficient. So notice to one member of a firm is notice to all. So where by statute an attorney is obliged to present his bill one month before suit, several underwriters being holden to pay, presenting to one is sufficient to maintain his action. In all these cases it is presumed that if one person liable to pay money is called on to do so, he will notify all who are liable to contribute to a part of it; and if this is not done, they are only subject to the inconvenience of a suit for money without being first notified.

Cases arising under the statute of limitations have also been cited where an acknowledgment of one joint promisor has been held sufficient to take a case out of the operation of the statute as to him and his joint promisor. These cases are not analogous. Slight evidence has been held sufficient to operate as a waiver of that statute, where courts have been satisfied that the debt had never been paid, and whether they had gone too far or not it is not now necessary to inquire. They do not apply

to the case under consideration. I am of opinion that it will be most conducive to justice, most consonant to mercantile usage, and the principles of law requiring notice, that all who may be affected by it should have notice of the dishonor of a bill or note, and that, in this case, a new trial ought to be granted.

HOSMER, J., gave no opinion, having been one of the counsel in the cause.

New trial to be granted.

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## CHALKER v. DICKINSON.

[1 Conn. 382.]

**PRESCRIPTIVE RIGHT OF FISHERY.**—No presumption of a public grant to an individual of an exclusive right of fishery in navigable waters arises from his uninterrupted use and possession of such fishery for fifteen years. To gain such exclusive right by use and possession, the possession and use must be exclusive as well as uninterrupted.

**TRESPASS** for disturbing plaintiff in the enjoyment of his right of fishery in the Connecticut river. The question raised by the facts in the case was, whether an uninterrupted possession and use for more than fifteen years would give an individual an exclusive right of fishery in a navigable river? The court instructed the jury that it would, and the verdict being in favor of the plaintiff, the defendants moved for a new trial.

*N. Smith and R. M. Sherman*, in support of the motion.

*Daggett and Staples, contra*, cited *Pilkin v. Olmstead*, 1 Root, 217; *Weld v. Hornby*, 7 East, 195; *Bealy v. Shaw*, 6 Id. 215; *Peake's Ev.* 294; *Sherwood v. Burr*, Day, 244.

SWIFT, C. J. In this case the court directed the jury, that an exclusive right of fishery could be acquired in a navigable river by an uninterrupted possession and use for more than fifteen years. The right of fishery by the common law in the ocean, in arms of the sea, and navigable rivers below high-water mark, is common to all, and the state only can grant an exclusive right. In rivers not navigable, the adjoining proprietors own the fishery, and can grant a right of fishing. Connecticut river being navigable in the place where this right of fishery is claimed, it could be acquired only in such manner as a public right can be appropriated or transferred. By the common law, no right could be acquired by use, possession and occupation, unless it had been from time immemorial; and this is called a right by prescription.

In England, by statute 21 Jac. I, c. 16, sec. 1, it was enacted that no person that has any right or title of entry, shall enter but within twenty years next after his right or title shall accrue. Courts extended the principle of this statute to similar cases within the same reason. A like statute was at an early period enacted in this country, limiting the right of entry to fifteen years; and courts extended the principle to similar cases. Hence it has become an established rule of the common law, that easements may be acquired by uninterrupted possession for fifteen years; such as rights of way, flowing another's land, diverting water-courses, fisheries and the like. But in every case of this description, the use and possession in the first instance are a usurpation of the rights of some other person, and an action would always lie till the fifteen years were elapsed. It is considered, that no man would permit another thus to occupy and possess his right without a grant; and in all these cases the law presumes there has been a grant, for the idea is not entertained that a man, by being a trespasser for fifteen years, can by the common law acquire a right. But as the grant depends upon a presumption of law, it is always competent to rebut it by proof of such circumstances as show no grant could have been made.

The general rule, then, is, that certain rights may be acquired against individuals by fifteen years uninterrupted possession and use, unanswered and unexplained: 2 Wm. Saund. 175, n. (2). But the case under consideration is of a very different description. The fishery in Connecticut river below high-water mark is common to all the citizens; the use and possession of the plaintiffs were lawful, and the mere lawful exercise of a common right for fifteen years has never been considered as conferring an exclusive right. This case, therefore, does not compare with the cases where a right is acquired by uninterrupted use and possession. Further, it does not appear that the plaintiffs were the sole possessors and occupiers of this fishery. They might have used it without interruption for the term of fifteen years; and so might others. At this rate, several persons might, at the same time, be acquiring an exclusive right to the same fishery; an absurdity that demonstrates the fallacy of the principle contended for. The public may grant the exclusive right of fishery in a navigable river; and if it may be granted, it may be prescribed for. Such a right shall never be presumed, but the contrary. It is, however, capable of being proved. In this case, the plaintiffs relied on the presumption arising from

uninterrupted use and possession for fifteen years. This would be presuming, not proving the prescriptive right. If he claims such right, he is bound to prove it: *Carter v. Murcot*, 4 Burr. 2162.

In this opinion the other judges severally concurred, except Hosmer, J., who declined acting, having been of counsel in the cause.

New trial granted.

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As to public proprietorships in navigable waters below high-water mark, see *Chapman v. Kimball*, 9 Conn. 40, citing this case. See, also, on this point, *Carson v. Blawie*, 4 Am. Dec. 463; *Horne v. Richards*, 3 Id. 574.

CASES  
IN THE  
SUPREME COURT  
OF  
NEW YORK.

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**COLEMAN v. SOUTHWICK.**

[9 JOHNSON, 45.]

**AVERMENTS NOT NECESSARY TO BE PROVED.**—A declaration in libel, after stating the plaintiff's good name, etc., then averred that the defendant well knowing the premises, etc., maliciously intending to injure the plaintiff and bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason and of the promulgation of treasonable sentiments, etc., published the libel. It was held that these were merely suggestions as matter of inducement, and unnecessary to be proved.

**EVIDENCE OF ANOTHER'S DECLARATIONS.**—Where a party published a libel taken from a paper, as an extract from another paper, in an action by the publisher of the paper against the party publishing the alleged libel, it was held that the testimony of a witness that he had heard the defendant ask another if he had not seen the alleged matter published in the plaintiff's paper was inadmissible in mitigation of damages, being in the nature of secondary and inferior evidence.

**DAMAGES IN TORT.**—In actions for slander, libel, and other personal torts, the court will not grant a new trial on the ground of excessive damages, unless the amount is so flagrantly outrageous and extravagant as manifestly to show that the jury must have been actuated by passion, partiality, prejudice or corruption.

**LIBEL.** The declaration stated that the plaintiff was a good and faithful citizen of the United States, of good fame, the editor of a certain newspaper, called the "New York Evening Post;" that the defendant, well knowing the premises, maliciously intending to injure plaintiff, and to bring him into scandal, infamy and disgrace, and cause it to be believed that the plaintiff had been guilty of the crime of treason, and of the promulgation of treasonable sentiments, and of an attempt to incite a civil war, published in

"The Albany Register," a newspaper printed and published by the defendant, a certain false, scandalous and malicious libel, to the damage, etc. Plea, the general issue, with notice of evidence of the truth of the matter charged as libelous. A motion for a nonsuit, on the ground that the publication produced in evidence did not support the charge of treason, was overruled. Defendant then offered evidence showing that the publication complained of consisted of an article copied from the "Public Advertiser," a New York paper, which article purported to be an extract from plaintiff's paper, with comments thereon by defendant; that defendant believed the extract to be a true copy of the article published by plaintiff, and that as to the literal variance, the defendant made corrections in the next issue of his paper. The testimony of one North was offered to prove that he heard one Stanley, in answer to a question asked by the defendant, say to him that he, Stanley, recollected that the extract as published in the "Public Advertiser" had appeared in plaintiff's paper. This testimony was rejected.

Verdict for the plaintiff for fifteen hundred dollars damages; and motion for a new trial.

*Foot*, for the defendant.

*Van Vechten*, *contra*.

KENT, C. J. The defendant moved for a new trial upon the following grounds:

1. That the plaintiff ought to have been nonsuited at the trial; 2. That the testimony of Samuel North, as to what he heard Stanley say, ought to have been received; 3. That the jury ought to have directed to find for the defendant; or, at most, but nominal damages for the plaintiff, because the publication was made under a mistake of the fact.

The declaration states by way of inducement to the libel, that the defendant maliciously intending to bring the plaintiff into public scandal, and cause it to be believed that he had been guilty of treason, and of promulgating treasonable sentiments, etc., published the libel. The counsel stated these were averments requisite to have been proved upon the trial, and that for a want of showing the existence of the charge of treason, the plaintiff ought to have been nonsuited. The answer is, that they are not such averments, but suggestions stated as mere inducement to the libel. It was not traversable matter any more than the ordinary preliminary suggestions in a declaration in slander, that the plaintiff is of good name, fame, etc.

The averments requisite to give meaning and application to the libel must be proved, and were proved in this case. The meaning of the libel and its application to the plaintiff were apparent on the face of the paper, and all that was required to support that meaning and that application, was the production of the paper and the proof of its publication. The meaning imputed to it in the declaration, when the true meaning of the libel and not the mere inducement to it is averred, was obvious from the paper itself.

2. The next point is that the testimony of Samuel North ought to have been received, when he offered to prove that he heard the defendant ask one Henry Stanley, who resided in New York, whether he recollected the extract, as published in Public Advertiser, appearing in the plaintiff's paper, to which Stanley replied that he did. This point appears to me to be as untenable as the other.

The cases which are the most analogous are those which were cited from Binney's Reports. In *Kennedy v. Gregory*, 1 Binn. 85, it was held that the defendant in an action of slander might give in evidence, in mitigation of damages, that a third person told him what he related. But it ought to be observed that in that case the person who gave the information was the witness offered to prove it. So in the case of *Morris v. Duane*, 1 Binn. 90 note, the defendant was allowed to give in evidence, in mitigation of damages, in an action for a libel, a paper containing the libelous charge, which had been in possession of a preceding editor then dead, and to whose paper the defendant had succeeded as editor. These decisions are certainly entitled to great respect. Perhaps they have even extended the English rule; and they would have applied if Stanley himself had been offered as a witness to prove his disclosure to the defendant. But to resort to a by-stander to prove what Stanley might have told the defendant when Stanley was within the reach of the defendant, and could have been produced, is going beyond the cases cited, and would be a dangerous relaxation of the rules of evidence. The established doctrine is that you must go if you can to the source of testimony, and not introduce a copy, when the original is to be had, nor undertake to prove what another person has been heard to say, when that person is a good witness, and can be produced. The testimony of North, though not technically hearsay evidence, is liable to the same objection; for it is resorting to an inferior or secondary species of proof, without necessity; and permit me here to add, that no one thing

in the administration of public justice concerns more seriously the security of life, liberty and property, then a firm disposition in the courts to adhere to the established rules of evidence. Why not produce Stanley to testify what he told the defendant, instead of resorting to a bystander who heard what he said? The latter evidence cannot be relied on as equally original and accurate. Stanley knew what he meant to communicate, which the other could not know. North might not have heard correctly what he did say, or all that he said. Another part of the conversation which preceded or followed might have explained the words which North heard, or varied their meaning. North might have misunderstood Stanley, or not have known whether he was in earnest, or was so understood by the defendant, or whether the conversation was or was not the result of a previous agreement between the defendant and Stanley, for the very purpose of providing for this case.

Hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. "A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author." It is against sound principle, and would at once awaken distrust, for a party to resort to a secondary species of evidence, so long as the original and primary evidence exists and can be produced. The plaintiff, by means of this species of evidence, would be taken by surprise, and be precluded from the benefit of a cross-examination of Stanley, as to all those material points which have been suggested as necessary to throw full light on his information. The testimony of North, as to what he heard Stanley say, could not afford the degree of proof which the fact might allow, nor admit those inquiries which conduce to a full and satisfactory explanation of what was related, and it was therefore properly rejected.

3. The last point is, that the damages ought to have been nominal only, because the publication was made under a mistake of the fact. The *quo animo* with which the libel was published was altogether a matter for the consideration of the jury; and the circumstances which might tend to aggravate or extenuate the damages, and lessen or increase the degree of malice which the law imputes to the publication of every unjustifiable libel, were no doubt urged to the jury upon the trial, as they have

since been presented to this court, upon the argument of the present motion. The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries. We can judge better of the legal and constitutional effect of a verdict in a case like this by recalling to our attention some of the adjudged cases.

In *Hawkins v. Sciel*, 20 Jac. I, Palm. 314, plaintiff recovered one hundred and fifty pounds in slander for calling him a bankrupt, and the court thought fifty pounds enough; but, upon solemn advice, they could not reduce the damages nor change the course of the law, and resolved that it was better to leave such matters to the jury. The case of *Townsend v. Hughes*, 23 Car. II. (2 Mod. 150), was an action of *scandalum magnatum*, and the jury gave four thousand pounds damages. A motion was made for a new trial on account of the excessive amount of the damages; but the court denied the motion, and said that the jury were the judges of the damages, and one of the judges observed: "Suppose the jury had give a scandalous verdict for the plaintiff as a penny damages, he could not have obtained a new trial in hopes to increase them, neither shall the defendant in hopes to lessen them." If the court could not say that these damages were excessive, they can hardly say so in any case of slander, and yet the court of C. B., of which Lord Camden was one, observed near a century afterwards, that that case had never been contradicted or denied to be law. In *Roe v. Hawkes*, 15 Car. II. (1 Lev. 97), the court made the like decision, where the damages in a common case of slander were seven hundred pounds. These were old cases, and Lord Camden says (2 Wils. 249), that there seemed to be only one case before his time where a new trial was granted in actions for torts, and that was the case of *Chambers v. Robinson*, 1 Str. 691, where the jury gave one thousand pounds damages in an action for a malicious prosecution. And he observed that the court were free to say,

that case was not law, as the reason assigned for the new trial, which was to give the defendant a chance of another jury, would be digging up the constitution by the roots. But in the early part of the reign of Geo. III. and prior to our revolution, there is a series of cases relative to the power of the jury over the damages in actions for torts, which are more interesting, because while they support with just spirit and firmness the constitutional prerogative of the jury, they define the limits of their power with greater precision, and settle it upon sound principles. The courts say there is a great difference between cases of damages which can certainly be seen, and such as are ideal, as between *assumpsit*, trespass for goods, etc., where the sum and value may be measured, and actions of false imprisonment, malicious prosecution, slander and other personal torts, where the damages are matter of opinion.

The law has not laid down what shall be the measure of damages in actions of tort. The measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances, as the state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury. The court cannot interfere, unless the damages are apparent, so that they can properly judge of the degree of the injury. Generally in such cases they cannot say whether five hundred pounds was too much, or fifty pounds would have been too little. The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess. These are the principles which have been laid down by the most eminent judges who have presided in the English courts since the year 1760; and by which they have uniformly governed themselves in cases in which the damages would appear to have been beyond all comparison, more excessive than in the present case: *Leeman v. Allen*, 2 Wils. 160; *Boardman v. Carrington*, 2 Id. 244; *Wilford v. Berkley*, 1 Burr. 609; *Redshaw v. Brook*, 2 Wils. 405; *Bruce v. Rawlins*, 3 Id. 60; *Huckle v. Money*, 2 Id. 205; *Leith v. Pope*, 2 W. Bl. 1327; *Gilbert v. Burtenshaw*, Cowp. 230; *Duberly v. Gunning*, 4 T. R. 651. In one case in an action for *crim. con.* the jury gave five thousand pounds, and Lord Kenyon said he would have been satisfied if only nominal damages had

been given, yet he knew of no case that would authorize the court to interfere, and he said he had not courage enough to make the first precedent. The doctrine contained in these cases has been acknowledged to be sound law, and has been adopted and sanctioned by the supreme court of Massachusetts, in the case of *Coffin v. Coffin*, 4 Mass. 1 [3 Am. Dec. 189]; and by this court in the case of *Tillotson v. Cheetham*, 2 John. 63 [3 Am. Dec. 459].

There is no pretense to say that the amount of the verdict in the present case is so extraordinary and extravagant as to justify the court under the above cases to set it aside. The precedent would be new and dangerous.

I am accordingly of opinion that the motion on the part of the defendant be denied.

THOMPSON and VAN NESS, JJ., were of the same opinion.

SPENCER, J., delivered a dissenting opinion.

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## JACKSON v. DEMONT.

[9 JOHNSON, 55.]

**CONVEYANCE BY ONE OUT OF POSSESSION.**—If a person out of possession conveys to a stranger land held adversely by another, the conveyance is void, so that the grantee cannot maintain an action upon it.

**RELEASE TO TENANT IN POSSESSION.**—Where a tenant in possession of land, claiming to hold adversely, after issue joined in an action of ejectment against him, received a deed of release of the premises from one of the lessors, it was held that the deed was effectual as between the parties to it, so that the grantor, as between him and the grantee, is estopped from setting up any claim to the property purported to be conveyed.

**DEED IN EVIDENCE.**—If a deed be received in evidence without objection on the trial, it cannot be afterwards objected that it ought to have been pleaded *puis darrein continuance*.

**EJECTMENT.** The lot in question was conveyed to John Wilcox in January, 1791, by letters patent, and he executed a deed thereof to Rufus Lathrop, one of the plaintiff's lessors, in 1794. Plaintiff also gave in evidence a deed for the premises from R. Lathrop to Joseph Nichols, the other lessor, dated April 8, 1808. The defendant had been in possession of four acres of the lot as tenant to Elijah Miller from the first April, 1808, and gave in evidence a deed for the lot, dated March 8, 1811, from B. Lathrop to Miller. Defendant also produced a deed for the premises, dated November 25, 1807, and recorded March 27, 1808, from Samuel Lathrop to Miller; and a lease from the latter

for four acres, dated April 4, 1808. It appeared that the defendant had cleared the four acres, and was in possession before the date of the lease, and had continued in possession as tenant to Miller, until the commencement of the action.

Pursuant to instructions, the jury found for the defendant. Motion for a new trial.

*Gold*, for the plaintiff, urged that a possession, in order to oust a person having right, must commence by disseisin: 9 Vin. 85, Diss. C. s. 10, 11, 12; 1 Leon. 209; 1 Salk. 246; 2 Sch. & Lef. 97; 12 East, 141; 1 Johns. 156; 6 Id. 197 [5 Am. Dec. 218]; and the interference of Miller was not such an act as would amount to a disseisin. The conveyance from R. Lathrop to Miller, was an act of maintenance, and in itself fraudulent and void: 15 Vin. Maintenance, E. pl. 22 note; 1 Hawk. c. 86, s. 17. The deed from Lathrop to Miller of March, 1811, being since issue joined ought to have been pleaded *puis darrein continuance*: 7 Johns. 194; 2 Rich. P. C. P. 13; Bull, N. P. 97; Yel. 180.

*Rodman, contra.*

By Court, KENT, C. J. Two questions arise on this case: 1. Is the lessor, Nichols, entitled to recover upon the deed from R. Lathrop to him? 2. If not, then can Lathrop himself recover in opposition to his deed to Miller, under whom the defendant holds? Unless we can answer one of the questions in the affirmative, judgment must be rendered for the defendant.

1. At the time of the execution of the deed from Lathrop to Nichols, the defendant was in possession under Miller, who held the land under a deed from another source. The possession was then adverse to the claim or right of Rufus Lathrop, and it is a well settled principle of law that if a person out of possession conveys to a stranger, land held adversely by another, the conveyance is void, so that the stranger cannot maintain an action upon it. Nothing passes by such a deed; for a right of entry or a right in action was not assignable by the common law. This doctrine is by no means a novel one, for it has been so frequently and uniformly acknowledged both in England and in our own courts, that it has now grown to be familiar and cannot be open for discussion: Lit., sec. 347; Co. Lit. 347, 369; Plowd. 88, b; 2 Sch. & Lef. 65, 105; *Jackson v. Todd*, 2 Cai. 183; *Williams v. Jackson*, 5 Johns. 489.

Indeed this principle was conformable to the whole genius and policy of the common law, by which a tenant could not

aliene his fee or tenure without the consent of his lord, nor the lord his seigniori without the consent or attornment of his tenant: Wright on Tenures, 166, 171. A feoffment was void without livery of seisin, and without possession a man could not make livery of seisin: Perkins, 220. Nor was this principle peculiar to the English law. It was a fundamental doctrine of the law of feuds on the continent of Europe. No feud could be created or transferred without investiture or putting the tenant into possession. *Feudum sine investitura nullo modo constitui potest. Investitura proprie dicitur possessio*: Feudorum, lib. 1, tit. 25; lib. 2, tit. 2. And Voet says that delivery of possession is still requisite in Holland and Germany to the transfer of real property: Com. ad Pand., lib. 41, tit. 1, s. 38. It is no doubt the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor has the capacity, as well as the intention, to deliver possession, and actually does it. Blackstone says, that it prevails in the codes of "all well governed nations," for possession is an essential part of the title and dominion over property: 2 Bl. Com. 311, 312.

That the possession of Miller was in fact adverse to the right of R. Lathrop, is most clearly made out, because he was in possession under color and claim of title, by virtue of a deed from Samuel Lathrop. This amounted to one of the species of disseisins mentioned by Bracton, who says, lib. 4, fol. 161, b, that "disseisin may be not only when the owner, or his family or steward are violently ejected, but also when the owner, having gone abroad and left his possession unoccupied, he is denied entry on his return; and so it is if one uses another's land against his will, claiming it to be his own, *contendendo tenementum esse suum quod est alterius*."

In the modern case of *Doe v. Prosser*, Cowp. 217, Lord Mansfield gives a sample of what constitutes an adverse possession. "If upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough." It does not seem to be material, as it concerns the operation of the deed that the knowledge of the adverse possession should be brought home to the parties, though it might be material, if either of them was prosecuted for the penalty given by the statute against selling pretended titles. In *Skywright and Page's case*, 1 Leon. 166, it was considered that the deed might be void, and yet the party not liable to the penalty of the statute. "The first question in that case

was, if the lease being made by one out of possession, and not sealed and delivered upon the land, and so not good in law to pass any interest, be within the statute aforesaid." But, in this case, the legal inference is, that R. Lathrop knew of the adverse possession of Miller when he sold to Nichols, for he must be presumed to be acquainted with his own right; and the presumption is that Nichols purchased under the same knowledge, for Miller had not only a tenant in actual possession, but his deed from S. Lathrop had been recorded several days before, and the lands lay in a county in which deeds, as well as mortgages, are required to be recorded. It is extremely improbable that Nichols purchased without having previously inspected the state of the title upon record, and inquired into the claims of the actual occupant. He had at least constructive notice or notice in law. The title set up by the lessor, Nichols, most undoubtedly fails, and the next point is, whether the other lessor, R. Lathrop, is entitled to recover; 2. It might possibly be a question whether the acceptance of the deed from R. Lathrop to Miller, was not an act of maintenance in Miller, as it was taken after the suit was brought, at least it was so understood upon the argument, and probably with an intent to defend himself with it in that suit. But as R. Lathrop was one of the lessors of the plaintiff, and had the title of the land in himself, it was not very inconsistent with good policy that he should be enabled to sell, and the tenant in possession to purchase, for it was putting an end to the controversy. We mean not, however, to discuss and decide this point in the present case; for even admitting the sale to have been an act of maintenance, yet the deed was effectual, as between the parties to it. Rufus Lathrop cannot recover in opposition to his deed to Miller. It operates to estop him; and it seems to be a principle which runs through the books, that a feoffment upon maintenance or champerty is good as between the feoffer and feoffee, and is only void against him who hath right: Bro. tit. Feoffments, pl. 19; Fitzherbert, J., in 27 Hen. VIII., fol. 23 b, 24 a; Co. Lit. 369 a, Cro. Eliz. 445; Beaumont, J., Hawk. b 1, c 86, s 3. The consequence is, that when the question is upon the demise of Rufus Lathrop, his deed to Miller is an effectual bar to his recovery. The only objection that could have been made to the introduction of this deed at the trial, assuming it to have been given after suit brought and issue joined, was that it ought to have been pleaded *puis darrein continuance*, so that it might have been returned as parcel of the *nisi prius* record.

This is no doubt the proper and general course: Yelv. 180; 2 Rich. C. P. 13. But it is a sufficient answer to this objection, that the deed was admitted in evidence, and went to the jury without opposition. It is, then, to be considered as admitted by consent, and is to have the same effect as if it had been duly pleaded.

Neither of the lessors of the plaintiff have, then, shown a right to recover. We can not give effect to the deed to Nichols, because of the adverse possession existing at the time of the sale; and we can not allow Lathrop to recover in defiance of his own deed to Miller. To yield to the pretensions of either would be shaking established principles; and, though Nichols may perhaps have ground to complain of the act of Lathrop in conveying to Miller, instead of lending his name and assistance to recover the possession of the land for him, yet that consideration can not affect this case. In the action of ejectment, we must look steadily to the legal title. His remedy, if any, must be against Lathrop for assuming to sell, when he was incapacitated to transfer his interest. Nichols can not interpose in this suit and prevent the operation of the deed to Miller. As to him it is *res inter alias acta*. He must stand upon the strength of his own demise.

The motion to set aside the verdict is, therefore, denied.

VAN NESS, J., dissented.

Motion denied.

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As to the effect of a deed by one out of possession this case is relied on in *Hamilton v. Wright*, 37 N. Y. 506; and in the dissenting opinion of Dwight, C., in *Shattuck v. Lamb*, 65 N. Y. 516, it is cited to the point of an estoppel against the grantor: See 4 Kent Com. 448, citing the principal case on this point.

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## PEOPLE v. GASHERIE.

[9 JOHNSON, 71.]

**RECOVERY OF INTEREST.**—Interest is recoverable against a person intrusted with the collection of money, who retains and converts it to his own use, from the time when the same ought to have been paid over.

**ACTION** against the executors of Joseph Gasherie, one of the loan officers of Ulster county, for retaining and converting to his own use divers sums of money he had received in his official capacity. A verdict was found for the plaintiff for the amount so converted, with interest from the times when the various sums should have been paid into the treasury. The only ques-

tion submitted for the decision of this court was as to the allowance of interest.

By Court. The late English decisions do not always allow interest on liquidated sums; and Lord Ellenborough refused it, even when the defendant had obtained possession of the plaintiff's money by fraud: 1 Campb. 129; 2 Id. 426. This is going further than we are inclined to go. If the defendant retains and converts the plaintiff's money to his own use, he ought to pay interest. It is allowable in actions for money had and received: *Pease v. Barber*, 3 Cai. 266. In trover for money in a bag, or for a specific chattel, the jury may, and in many cases ought to, allow interest for the detention by way of damages: 3 Burr. 1364; 1 Bay's, 273, 274 [1 Am. Dec. 615]; 2 Johns. 282. It is agreeable to the principle of these decisions, and it is just and reasonable in itself, that the defendant who retains and converts the money of another to his own use, should pay interest for that use. Interest ought therefore to be allowed in the present case.

Judgment for the plaintiff.

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See note to *Selleck v. French*, *ante*, 185, where the subject of interest is considered.

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## DENTON v. LIVINGSTON.

[9 JOHNSON, 96.]

**LIABILITY OF SHERIFF FOR GOODS SOLD.**—A sheriff is liable in an action of *assumpsit*, for the amount of goods sold by him under a *venditioni exponas*, though the purchaser to whom the goods are delivered refuses to pay for them. If he delivers the goods seized and sold without receiving the money, he is answerable for the amount.

**ASSUMPSIT.** Besides the usual money counts, the declaration contained special counts, setting forth that the defendant, as sheriff, had levied a writ of *venditioni exponas*, at plaintiffs' suit upon the property of one Edmonds; had indorsed a return on a *test. fi. fa.*: "By virtue of the within writ of *test. fi. fa.* I have taken goods and chattels of the within named Samuel Edmonds, to the value of the damages within mentioned, which goods and chattels remain in my hands unsold for want of buyers;" and that defendant had sold the same and realized sufficient to satisfy plaintiffs' execution, but had not paid over the same. Plea, *non-assumpsit*. Plaintiffs proved that the amount of the sales was sufficient to satisfy their execution, and that the sale was for immediate payment. It appeared that among the goods and

chattels sold was a sloop which had been delivered to the purchaser, Ashley, but for which the purchase-money had not been received by the sheriff; there were also certain shares in the Hudson library and in the Bank of Columbia, for which Ashley, the purchaser, had not paid.

The jury were instructed that the plaintiffs could not recover for the shares, as they were not the subject of sale, nor for the amount at which the sloop sold, the defendant not having received the money. The jury found for the plaintiffs the balance after deducting these items.

*Van Buren and Foot* for the plaintiff, moved for a new trial, contending that the sheriff was answerable for the value of the goods as returned by him: 2 Saund. 643; *Clerk v. Withers*, 2 Ld. Raym. 1072.

*E. Williams, contra.*

By Court, KENT, C. J. It is not a question upon the present motion, whether the last count stated in the case was properly joined with the other counts. The first special count stated is upon an implied *assumpsit* to pay the amount of moneys collected and received upon the writ of *venditioni exponas*, and the point is, how far the evidence supports the count.

There is no doubt but that a sheriff is responsible in *assumpsit* upon the facts stated in that count: *W. Jones*, 430; *Hob.* 206. It might be a question whether after the sale, the sheriff was not concluded by the value of the goods as stated in his return to the *fi. fa.*, for he returned that he had taken goods and chattels to the value of the damages in the execution. The general rule is that an officer cannot be admitted to contradict his own return. In *Clerk v. Withers*, 2 Ld. Raym. 1072; 6 Mod. 290, Holt, C. J., said that the sheriff was bound by the value returned, and that he was bound to see that the goods sold for that value; and he gives this reason for his opinion, that when the sheriff levies on goods to the value of the debt, the defendant is discharged, whatever may become of the goods, and he may plead such levy in bar to an action of debt or *sci. fa.* on the judgment. This point, however, does not appear to have been judicially settled, and in the ancient case of *Sly v. Finch*, Cro. Jac. 514, the judges seem to have entertained a different opinion; for Houghton, J., said that the sheriff was not estopped by the return value, and that he might sell the goods for more or less, and that it would not be reasonable to hold him to the estimated value. *Dodderidge, J.*, and *Montague, C.*

J., rather acquiesced in this principle, and only held, if the property should in the meantime perish, after the levy and before a sale, the sheriff should be held to his value, as it would be impossible then to reduce the value to certainty. In the present case, the counsel for the plaintiffs do not appear to have contended, at the trial, for the value of the goods as returned to the *fi. fa.*, but to have equitably referred the case to the fact of the amount of the sales. If the sheriff conducts himself throughout the business with diligence and fidelity, this is certainly the more just rule, and the judgment ought not to be considered as any further satisfied as against the original defendant, than the amount of the proceeds of such sale, for it may often happen that the property seized and returned as of the value of the debt, may be found not to belong to the defendant, or may be found to be of much less value, by the fall of the market between the levy and the sale, or by means of some concealed defect or infirmity. We shall, therefore, waive the further consideration of this point, and proceed, as the plaintiffs did at the trial, to consider the actual sum for which the sheriff ought to account upon the sale, as made and proved.

1. He is answerable for the amount of the sale of the sloop, and his excuse for not returning the money is insufficient. Instead of retaining the sloop in his possession between the levy and the sale, he delivered her to Ashley, the purchaser; and as he afterwards sold her to him, and has lost the possession, he is answerable for the money she sold for. There is no other remedy for the plaintiffs. They cannot call upon the original defendant for the amount of this sloop, for he would plead this seizure by the sheriff in bar; and if the sheriff by such means as the delivery and subsequent sale of the chattel, without the money, could avoid answering for the amount, there would be no certainty and safety to the creditor, by the process of execution.

2. But the bank and library shares were levied on by mistake; for these were mere choses in action, and not the subject of a levy and sale by *fi. fa.* any more than bonds and notes, and such things cannot be taken in execution: *Francis v. Nash*, 7 Geo. II., K. B., cited in Com. Dig. tit. Execution, c. 4.

As, therefore, the charge of the judge was incorrect in ruling that the defendant was not answerable for the amount of the sale of the sloop, there must be a new trial, with costs to abide the event.

Rule granted.

## BERRY v. ROBINSON.

[9 JOHNSON, 121.]

**DEMAND NECESSARY AFTER MATURITY.**—An indorsee of a promissory note overdue, is still bound to prove demand and notice in the same manner as he would if he received the note before maturity.

**ASSUMPSIT** against the indorser of a promissory note. The note was indorsed to plaintiff by defendant four years after maturity. The plaintiff did not prove a demand upon the maker and notice, whereupon a nonsuit was ordered.

*Cady*, in support of a motion to set aside the nonsuit contended, that where a note was negotiated after it became due, it was the same as a new note by the indorser, and there was no necessity of demand and notice: *Brown v. Davis*, 3 T. R. 80; 5 Johns. 118.

*Henry, contra.*

**By COURT.** The plaintiff was properly nonsuited, for not proving demand of payment on the maker, and notice of his default to the indorser. Though the note was indorsed long after it was due, yet the indorsee took it subject to this condition. The books make no distinction on this point, whether a note be indorsed before or after it is due. The indorsement in every case where a drawer really exists, is a conditional contract to pay in the event of a demand, or due diligence to make a demand on the maker, and his default. It was equivalent in this case to an order on the drawer to pay the amount. The motion to set aside the nonsuit is denied.

Motion denied.

## JACKSON v. SHARP.

[9 JOHNSON, 163.]

**WHEN POSSESSION NOT ADVERSE.**—A. entered into possession of land admittedly without title, and afterwards entered into a contract with T., who covenanted to give him a deed. T. had no title, and only claimed to hold under B. Thereafter, A. assigned the contract to S., who took possession thereunder, and afterward received the deed from T. Subsequently he obtained a deed from B., the patentee and true owner. It was held that the original possession of A., being without title, was to be deemed the possession of B., the patentee, and that the possession of S., under the covenant from A. to T., was not adverse to B. so as to defeat a deed made by him during that possession.

**PRESUMPTIONS IN FAVOR OF TITLE.**—Every presumption should be made in

favor of a possession in subordination to the title of the true owner; an adverse possession must be strictly and conclusively proved.

**NOTICE TO AGENT.**—If a subsequent purchaser have notice at the time of his purchase of a prior unregistered deed, it is the same to him as if such deed had been registered; and if the agent of such subsequent purchaser, at the time of making the purchase, knows of the prior or unregistered deed, it is the same as notice to his principal.

**EJECTMENT** to recover part of lot seventy-two in the county of Cayuga. The plaintiff gave in evidence a patent to Bonnell, one of the plaintiff's lessors, dated July 8, 1790, for lot seventy-two, and a deed from Bonnell to Goodyear, the other lessor, dated September 11, 1807, and recorded April 25, 1811. Defendant's possession was also proved. The defendant produced articles of agreement between Grover, the authorized agent of Thorn, and S. and A. Foster, for the conveyance to the latter, at a future day, for a price to be paid at that time, of lot seventy-two, which articles of agreement were assigned by the Fosters to Sharp, the defendant, on the twenty-sixth day of April, 1808. By deed dated November 26, 1807, Thorn conveyed to defendant eighty acres of the lot, being the premises in question, for a valuable consideration. A witness testified that about three years before the trial, he went to Virginia to purchase the premises from Bonnell for the Fosters, and other occupants of lot seventy-two, and was then told that Bonnell had conveyed the same to Goodyear; this information witness had given to Grover. It also appeared that one of the Fosters admitted that he entered on the land without title, and had asked Grover to procure a title. There was produced in evidence a deed from Bonnell to the defendant and the other occupants of the whole lot seventy-two, dated September 29, 1808, and recorded October 12, 1808.

A verdict was taken for the plaintiff by consent, subject to the opinion of this court.

*Sill and Cady*, for the plaintiff.

*Russell, contra*, urged that to constitute the possession adverse it is sufficient if the tenant holds under a title different from, or hostile to, that of the lessor: *Jackson v. Todd*, 2 Cai. 133; S. C., 6 Johns. 267. The notice of a prior, unrecorded deed to defeat a subsequent deed must be direct, fair and *bona fide*.

By Court: To entitle the plaintiff to recover upon this case, two propositions must be established: 1. That the deed from Bonnell to Goodyear was not void by reason of an adverse possession existing at the time; 2. That notice of that deed destroyed

the effect of the prior registry of the deed from Bonnell to the defendant.

1. When the patentee, Bonnell, executed his deed to Goodyear, the defendant was in possession, under a covenant from Stephen Thorne to the Fosters, to convey to them the premises, upon a consideration to be paid. The Fosters entered upon the premises without title, as one of them confessed, and he spoke to Grover, the agent of Thorne, to procure a title. When he first spoke to Grover, the latter did not say that Thorn had any title; but, about a year afterwards, Grover told him that Thorn had a deed from the soldier Bonnell. The defendant entered under an assignment of the covenant to the Fosters. Whatever pretense or color of title the defendant had, at the time of the execution of the deed to Goodyear, it was avowedly under Bonnell, the patentee. The original possession by the Fosters being without any pretense of title, was to be deemed the possession of Bonnell, the true owner; and think it would be carrying the doctrine of adverse possession beyond the authorities, and beyond the truth of the case, to consider the covenant of Thorn, who said, or what is the same thing, whose agent said, that he held under Bonnell, as amounting to an ouster of Bonnell, and an act in denial of, and in hostility to his right. What kind of right or title Thorn pretended to have from Bonnell does not appear. His right might have been under a mere covenant or contract to convey such as he afterwards made with the Fosters; and we have no ground to infer that he had any better pretension, when Bonnell conveyed to Goodyear in September, 1807.

It is a settled rule, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. It is not unusual for persons to contract to convey at a future day in expectation of a capacity to convey by the given day, though they have no title at the time of the contract. The Fosters were originally in possession, in judgment of law, under Bonnell; and they never meant to change that character, and to oust Bonnell by taking the covenant from Thorn. They took it, undoubtedly, under the impression that Thorn then was, or would thereafter be, authorized to convey the title of Bonnell; and the defendant, as the assignee of the Fosters, must be deemed to have succeeded to the possession under the same impression. Thorn was never in possession, and of course there was no adverse possession to be imputed to him. Foster and

the defendant held possession, without setting up any adverse title, and under a contract for a title to be derived from Bonnell. To consider Bonnell as thereby disseised, or dispossessed of his freehold, and to have lost his capacity to convey the land is inadmissible. Adverse possession so as to defeat the conveyance of the true owner, must be made out clearly and positively; and so the court said in the case of *Wickham v. Concklin*, 8 Johns. 220.

2. The next question, whether this deed was superseded by the subsequent deed from Bonnell to the defendant, of September, 1808, and which was first recorded. There is no doubt that if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered deed, it is the same to him as if it had been registered. It is not a secret conveyance by which he can be prejudiced or defrauded; and if he purchases with knowledge of such prior deed, and with the expectation of getting his deed first registered he does an act against good conscience, and in abuse of the statute, which was to prevent, and not to protect, fraud. It is, therefore, a well settled principle, that such notice supplies the place of a prior registry, and the only question here is, whether the defendant is chargeable with such notice.

In July, 1808, and about three months before the defendant's deed, John Haring went, as an agent for the defendant and the other occupants of the lot, to purchase the lot of Bonnell. Bonnell refused to sell, and told him that he had already conveyed the lot to Goodyear, one of the lessors of the plaintiff. Here, then, was a direct and positive notice to the agent of the defendant. Having communicated this fact to Joseph Grover, who in September following went, as agent for the defendant and the other occupants, to purchase, and succeeded in his mission. It is to be inferred that Grover was the agent also of the defendant, and, as such, made the purchase, because he had before acted as agent for Thorn in selling the lot, and because he applied to Gould to go to the patentee and make the purchase; and, lastly, because we find him in Virginia at the time of the purchase, and a witness to the execution of the deed. No doubt he was the agent who made the purchase, and from whom the deed was afterwards received. Here we have, then, notice of the prior deed given to two successive agents of the defendant, and both employed for the very purpose of making the purchase. The notice in each case was direct and positive, and given prior to the purchase. Can we possibly

doubt after this whether the knowledge of the prior deed was communicated from these agents to their principal, and especially by the first agent, whose object was defeated, in consequence of the very fact of the prior deed? The defendant confessed, in 1810, that "he never believed in his former title." But we need not bring home the notice to the defendant, for it is a well settled rule that notice to the agent is notice to his principal. This has been frequently so ruled in respect to the very question of a prior unregistered deed, and in respect to the agent employed to effect that purchase: *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64; S. C. Amb. 436; *Lord Forbes v. Deniston*, and other cases therein cited, 13 Ves. 120.

We are, accordingly, of opinion that the plaintiff is entitled to judgment.

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### RIPLEY v. GELSTON.

[9 JOHNSON, 201.]

**LIABILITY OF PUBLIC OFFICER TO REFUND.**—Where a collector levied a tonnage duty illegally, and the same was paid compulsorily, it was held he was liable to refund the amount, notwithstanding he had paid over the money to the government, and no notice was given him not to pay over the money so collected.

**NOTICE UNNECESSARY.**—Notice to an agent not to pay over the money to his principal is not necessary where the payment is compulsory, and it is not made expressly for the use of the principal.

**ASSUMPT.** It appeared that the Spanish ship *Maria Theresa*, bound from Havana to London, was forced by stress of weather to put into New York, where she was entered at the custom-house as a vessel in distress. She was condemned, after a regular survey, as unfit to be repaired, and sold by the agent of the Spanish owner to the plaintiffs. After making repairs, the plaintiffs, as owners, entered a clearance at the custom-house as for a voyage to Cadiz, when the defendant, as collector of customs, demanded and received two hundred and sixty-six dollars and seventy-five cents as tonnage duty and light money. This payment was objected to by the plaintiffs at the time they made it, on the ground of its illegality. Prior to the commencement of this suit, the defendant had paid the sum over to the Branch Bank of the United States in New York to the credit of the treasurer of the United States; no notice had ever been given to the defendant or other custom-house officers not to pay the money over to the United States.

*Baldwin*, for the defendant, cited the acts of congress relative to the collection of duties on tonnage: 1 Cong. sess. 2, c. 30; 2 Id. 2, c. 1; 8 Id. 1, c. 57; and contended, that in any event, the payment of the money to the credit of the United States before any notice not to do so, relieved the defendant from any liability: 8 Ld. Raym. 1210; 4 Burr. 1985; 2 Cowp. 565; 4 T. R. 553; Chitty's Pl. 25; *Hearsey v. Pruyn*, 7 Johns. 179.

*T. A. Emmet, contra.*

By COURT. The principal question here is, whether the defendant was authorized to demand the money which he exacted of the defendants, as the tonnage or light money of the ship they had purchased. The ship arrived in the port of New York in distress, and was entered in September, 1809, and being condemned and sold by the wardens of the port, the sum in question was exacted, on the clearance of the ship, on another voyage in May, 1810.

The law (Laws of U. S., vol. 4, 384,) requires tonnage to be paid at the time of entry, and no permit to unlade is to be granted until the duty is paid. This is the general rule on the subject; and light money on the entry of foreign vessels, is to be levied in the same manner as tonnage: Laws of U. S., vol. 7, 157. But there is a special provision for the case of vessels arriving in distress. They are to be unloaded free of duty when there is a necessity for it, and when the goods are reladen, the ship may proceed "to the place of her destination," free of any other charge than what relates to the storage of the goods, etc.: Laws of U. S., vol. 4, 377. The statute does not provide especially for the case in which the ship so arriving in distress is necessarily condemned and sold, and the voyage broken up; but the reason of the exemption seems to apply. The permit to unload the goods from the ship, without exacting the tonnage, is an admission of the exception. If tonnage be not due when the ship so arriving in distress is repaired, and enabled to renew her voyage, it would be inconsistent and unjust to demand it when she was so disabled as to be incapable of repair, or of renewing the voyage. This would be to waive the duty in the case of a moderate, and require it in case of an extreme calamity to the ship. When the plaintiffs purchased the ship, they did not purchase her with this tonnage duty as a lien attached to her. Suppose her very wreck had been purchased, and a new ship had been built on the same keel and with the same name,

would any person have thought of the tonnage duty? The very entry of the ship in distress and landing of the goods, seems to have put an end to the tonnage duty, provided there was no collusion or bad faith in the transaction, and the voyage was interrupted, or finally broken up, from the necessity of the case.

The tonnage or light money in question was, at any rate, wrongfully demanded of the plaintiffs as a condition of the clearance, and that being established, they are entitled to recover it back in this action, without showing any notice to the defendant not to pay the money into the public treasury. The cases which exempt the agent from the suit, if he has in the meantime paid over the money to his principal, without notice, do not apply. Here is no person but the defendant against whom the suit could, in any event, be brought, and the money was paid by compulsion. It was extorted as a condition of granting the clearance, and not paid with the intent or purpose that the collector should pass it to the credit of the United States. The case of *Snowden v. Davis*, 1 Taun. 359, lays down this just distinction, that notice to the agent is not requisite in the case of a compulsory payment, and one not made expressly for the use of the principal. The plaintiffs are accordingly entitled to judgment.

Judgment for the plaintiffs.

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In *Frye v. Lockwood*, 4 Cow. 456, Sunderland, J., very correctly gives the *ratio decidendi* of the decision in this case. He says: "The money was paid by compulsion; it was extorted as a condition of granting the clearance and not paid with the intent and purpose that the collector should pass it to the credit of the United States." On the subject of notice the case is cited in *Elliott v. Swartwout*, 10 Peters, 157, 158.

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## GOSHEN AND MINISINK TURNPIKE ROAD v. HURTIN.

[9 JOHNSON, 217.]

**LIABILITY OF STOCKHOLDER FOR SUBSCRIPTION.**—An action may be maintained against a stockholder in a turnpike corporation, at the suit of the corporation, on his promise in writing to pay for subscribed shares in installments, notwithstanding the remedy given by statute forfeiting the shares and previous payments.

**ASSUMPSIT** on a promissory note made by the defendant, in which he "promised to pay to the plaintiffs one hundred and twenty-five dollars, for five shares of the capital stock of the said corporation, in such manner and proportion, and at such

time and place as the said plaintiffs should from time to time require." The cause was submitted without argument upon a joinder in demurrer to the declaration.

By COURT. The note set forth in the declaration is a good promissory note within the statute, though it has not the words "bearer or order," and may be declared upon as such. This is the established English law: 6 T. R. 123; 2 Ld. Raym. 1545; and the same rule was recognized by this court in the case of *Downing v. Backenstoës*, 3 Cai. 137; for our statutes relative to promissory notes is the same in substance as the statute of 8 and 4 Anne. The note was payable in money, and payable absolutely, and not depending on any contingency. It was in effect payable on demand, and it was not requisite that a consideration should be averred or appear on the face of the note, for every note within the statute, unless there be something in the note itself to the contrary, imports a consideration; and that presumption stands good until the defendant destroys it. There is, however, a consideration appearing on the face of the note in this case, for the promise to pay the one hundred and twenty-five dollars, was "for five shares of the capital stock of the corporation;" and it is to be intended that the defendant had duly become a stockholder to that amount.

But the question which the parties undoubtedly had principally in view in this case is, whether an action will lie at all on a promise by a turnpike stockholder to pay his installments; and whether the remedy given to the company by the statute, to exact the penalty of a forfeiture of the shares, and of all previous payments, be not the only remedy.

The decision of the court of errors, by which the decision of this court, in the case of the *Union Turnpike Co. v. Jenkins*, 1 Cai. 381, was reversed, may have given countenance to that opinion, but we apprehend that upon a careful examination of that case the reversal is to be placed in other grounds, and that the reasoning and decision of the court upon the principal point remains good. In that case the condition upon which Jenkins was to become a member of the company, viz., paying ten dollars, had not been performed, and the corporation was understood not to have been *in esse*, at the time of the making of the promise by Jenkins. It is to be presumed that the judgment of reversal went upon that ground; and that was the ground taken by the chancellor, who was then the principal law member of that court. We are the more confirmed in this

view of that case, as actions upon such promises are sustained in the courts of Massachusetts and Pennsylvania, and upon principles which we deem conclusive: 5 Mass. 80 [4 Am. Dec. 89]; 2 Hall's Law Journal, 231; 1 Binn. 70.

Judgment for plaintiffs.

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## STARR v. VANDERHEYDEN.

[9 JOHNSON, 253.]

**DEALINGS BETWEEN ATTORNEY AND CLIENT.**—On general principles of equity and policy, the court will strictly regard and examine the dealings between attorneys and their clients, in order to protect the latter from any undue consequences resulting from a situation in which they may stand unequal. Accordingly, where a judgment was entered by an attorney by confession against his client, partly for costs, an inquiry was ordered as to the consideration, and proceedings stayed in the meantime.

Motions on behalf of the defendant, in several actions between the same parties, for relief against judgments entered by confession on bonds and warrant of attorney. The plaintiffs were attorneys, and the defendant their client, and part of the demand for which the judgments were entered was for their costs.

*Mitchell*, for the defendant.

*Russell and Starr*, *contra*.

By COURT. The court, from general principles of policy and equity, will always look into the dealings between attorney and client, and guard the latter from any undue consequences resulting from a situation in which he may be supposed to stand unequal. The court acknowledge the justness and application of the doctrine laid down by Lord Loughborough in *Newman v. Pease*, 2 Ves. jun. 199. The judgment obtained by an attorney from his client by confession, must only stand as a security for what is actually due. In order to enforce this principle without intending any censure upon the attorneys in this case, the court direct the following rule:

“That it be referred to the clerk of this court to inquire into the consideration of the bond on which judgment has been entered on warrant of attorney; and that the plaintiff on such inquiry shall adduce proof of the consideration of the notes attached to the bond, and for what causes and under what circumstances the notes were given and executed by the defendant, or

answer himself to such interrogatories as shall be exhibited. It is further ordered that it be referred to the clerk, to tax the plaintiff's bill of costs in the said causes, to secure the payment of which the bond and warrant of attorney on which the said judgment was entered were given; and that the clerk give notice to the parties of the time and place of his proceedings under these orders, and that he report thereon to this court, and that in the meantime all further proceedings therein be stayed."

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Cited and relied on in *Whitehead v. Kennedy*, 69 N. Y. 466.

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## JACKSON v. VOSBURGH.

[9 JOHNSON, 270.]

**PARTITION BY PAROL.**—Where a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet, where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition and subsequent possession will not be sufficient to transfer the title.

**EJECTMENT.** The case appears from the opinion of the court before whom it came on a motion for a new trial.

*Van Vechten and E. Williams*, for the defendant, in support of the motion, cited: 3 Johns. Cas. 295; 2 Cai. 383; *Jackson v. Harder*, 4 Johns. 202 [4 Am. Dec. 262]; *Smith v. Burtis*, 6 Johns. 197 [5 Am. Dec. 218.]

*Van Buren and Foot*, contra.

By COURT. Johannis Van Deursen, deceased, is admitted to be the source of title, as claimed by both parties. His son Robert, under whom the lessors of the plaintiff derive title, was his heir at law, and the defendant claims under John, a younger son of Johannis. To establish his right, the defendant introduced the will of Johannis, and then went into proof to show that the three sons held and used the real estate, of which their father died seised, as tenants in common, until about the year 1786, when a parol partition was made between them, upon which the premises in question were allotted to John. On the part of the plaintiff, proof was offered to show that Johannis Van Deursen was incapable of making a will. This was objected to, but admitted by the judge, if the defendant relied upon the will to establish his title. Upon this the defendant

electd to abandon the will, and rely upon the right derived under the parol partition. One of the grounds urged in support of the present motion is, that this will was improperly excluded. There certainly can be no pretense for setting aside the verdict on that ground; for, if the defendant set up this will as part of his, and meant to rely upon it to take away the right of the heir at law, it was surely competent for those claiming under the heir at law to show that the testator was incapable of making a will. The only question before the jury was respecting the parol division; and if this division was valid in law, it might be questionable whether the verdict ought not to be set aside as being against the weight of evidence. There is no doubt but that where the title is admitted to have been in common, a parol partition, followed up by possession, will be valid and sufficient to sever the possession: 4 Johns. 212 [4 Am. Dec. 262.] But where the whole right and title of the party setting up such tenancy in common is denied, and in fact abandoned, as in the present case, by laying out of view the will of Johannis Van Deursen, the parol partition will not operate as a transfer of title. The will having been abandoned, the title was in Robert, as heir at law, and that could not be divested by parol. The possession in common was for such a length of time, that, perhaps, a title in common might have been presumed, had not the defendant shown the source from which he claimed to have derived it. But this source being the will of Johannis Van Deursen, and that having been abandoned, the door was shut against the presumption of any other title. No question as to adverse possession appears to have been submitted to the jury; and had there been, there is no ground to disturb the verdict on that account. The motion for a new trial must accordingly be denied.

Motion denied.

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## YEOMANS v. CHATTERTON.

[9 JOHNSON, 295.]

**CONTRACTS VOID AGAINST PUBLIC POLICY.**—At the meeting of the creditors of an insolvent, one of the creditors refused to sign a discharge unless he was first paid or secured a sum of money, part of his demand. Another creditor gave him his promissory note for this sum, when he signed. In an action brought on the note, it was held that the note was absolutely void, being against the policy and in fraud of the insolvent act.

**ASSUMPSIT** on a promissory note made by Yeomans in favor of Chatterton for the sum of fifty dollars. It appeared that the

note was given to induce Chatterton to become a petitioning creditor to have one Ketcham discharged under the insolvent act. Evidence as to whether Ketcham had not indemnified Yeomans against the note was received, the defendant objecting. The verdict being for the plaintiff Chatterton, a writ of error was taken to this court.

*H. Bleecker*, for the plaintiff in error.

*Ruggles, contra.*

By COURT. The note on which the suit below was brought, was given to Chatterton in payment of part of his demand against Ketcham, and upon the evident understanding and confidence that he should become a petitioning creditor under the insolvent act, for the residue of his demand, as he accordingly did. The note was consequently void, as being given against the policy, and in fraud of the insolvent act of the third of April, 1801. By that act the petitioning creditor makes affidavit that such a sum is due, or will become due, and that he hath not received from the insolvent, or any other person, any payment of part of his demand, in money or by sale, etc., or any gift, or reward, upon any contract or confidence, that he should become a petitioner. Here, Chatterton did receive payment of part of his demand, by delivery of a thing in action, *i. e.*, the note, and upon the confidence that he should become a petitioner. The demand here, in the oath which the creditor takes, is not to be confined to the sum already mentioned in the affidavit, for that would be an absurd construction of the act. After the creditor has already said that such a sum was due, it would be idle to swear further that he has not received payment of part of it. The statute refers to his pre-existing demands, whenever and whatever they may be. He must receive no part in consideration of his becoming a petitioner. If he holds two notes against the debtor, he must not receive payment of one of them in consideration of becoming a petitioner for the other. The policy of the statute is to preserve just dealing, equality and good faith between the creditors, not that one creditor should be induced to become a petitioner for his whole demand, by the apparently benevolent example of another, who has secretly extorted nineteen-twentieths of his demand, on the condition of becoming a petitioner for the remainder.

This position being established, it follows that the questions admitted by the court below be put to the witness, were irrelevant, immaterial, and consequently improper. The testimony

thus admitted tended to mislead the jury from the true point, and induced them to act upon erroneous impressions. If the note was void *ab initio*, any testimony that Ketcham had indemnified Yeomans was useless and improper.

Judgment reversed.

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## JOHNSON v. WEED.

[9 JOHNSON, 310.]

**PROMISSORY NOTE TAKEN IN PAYMENT.**—A promissory note of a third person is no payment of a debt, unless the creditor agrees to take it absolutely as payment. And where a note was taken as payment, and a receipt in full given by the vendor, it was held a question of fact for the jury, whether there was such a special agreement or not.

**ASSUMPSIT** for goods sold and delivered. The sale and delivery were admitted. It appeared that plaintiff had taken the note of one Townsend, payable in sixty days, in satisfaction for the goods, and had given defendants a receipt in full; but whether the note was received as payment, the plaintiff agreeing to run the risk of its being paid, did not positively appear from the evidence, and was submitted to the jury for their decision. Townsend became insolvent before the maturity of the note and had never paid anything thereon. The jury found for the plaintiff for the value of the goods.

*Foot*, for the defendants, moved for a new trial.

*Parker, contra.*

**By Court.** If it was a part of the original agreement between the parties, that the plaintiff should take Townsend's note in full satisfaction of the goods sold, so that he, and not the defendants, should run the risk of the note, then, undoubtedly the plaintiff has no right of action. But the fact, whether such was or was not the agreement, was submitted to the jury, and they have decided in favor of the plaintiff. The books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment if it afterwards turns out to be of no value: 2 Ld. Raym. 929, 930; 1 Salk. 124; 7 T. R. 66; 3 Johns. Cas. 72; 6 Cranch, 264. And this rule requiring such a special agreement ought to be adhered to, for it is well calculated to prevent fraud and support justice. Was the evidence of the agreement in this case so clear as to call upon the court to set aside the verdict? One witness understood the agreement in

that light, yet, when the note was offered in payment, the plaintiff said it ought to have been indorsed by the defendants, and the defendants did not then urge the alleged agreement that they were to take no risk of the note, but removed the objection of the plaintiff by saying that it would make no difference. The terms of the receipt are not decisive. It might still have been understood consistently with the words of it, that the note was received in full, under the usual condition of its being a good note, and besides, receipts have always been held open to explanation.

Upon the whole, there was evidence on both sides, and as the justice of the case is as much, if not more, with the plaintiff than the defendants, the court cannot interfere.

Motion denied.

See *Whitbeck v. Van Ness*, *post*.

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### TAFT v. BREWSTER.

[9 JOHNSON, 334.]

**PERSONAL LIABILITY OF AGENTS.**—A bond was executed by certain parties, who were described as "Trustees of the Baptist Society of the town of R;" but they executed it in their individual names and by their seals. They were held personally liable, and the designation affixed was more *descriptio personarum*.

**ACTION** on a bond conditioned for the payment of certain sums of money at specified times. The bond was signed by the defendants, as follows: "John Brewster, Thaddeus Loomis and Joseph Coats, trustees of the Baptist Society of the town of Richfield," and sealed by them respectively. The plaintiff assigned two several breaches for the non-payment of two several sums. Defendants' demurrer that the bond was signed by them in their corporate, and not in their individual, character; that the declaration was double, and that the breaches were not assigned as "according to the statute." Joinder.

**By COURT:** The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound the church certainly is not, for the church has not contracted, either in its corporate name or by its seal. The addition of trustees to the names of the defendants is, in this case, a mere *descriptio personarum*. But there is one special cause of demurrer well taken, and that is, that the declaration is double, in assigning

two distinct breaches. Several breaches may be assigned under the statute, on a bond for the performance of covenants, or other collateral matter; but this is not a bond within the act, for it is a bond for the payment of money only. The case is, therefore, to be governed by the common law rules of pleading, which would not permit the assignment of more than one breach, because one was sufficient to forfeit the bond, and entitle the plaintiff to the penalty. If, therefore, a bond was conditioned to pay several sums of money at several days, a non-payment of any sum would forfeit the bond; and the plaintiff was permitted to assign a breach only of one of the payments, as, otherwise, it would be double; and duplicity is still bad on special demurrer: 2 Vent. 198; 1 Roll. 112; Cro. Car. 176. Judgment must, therefore, be given for the defendants, with leave, nevertheless, to the plaintiff to amend on the usual terms.

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In the note to *McDonough v. Templeman*, 2 Am. Dec. 513, the signing by an agent is considered, and this case noticed. The authority of the case is relied on in *Kiersted v. R. R. Co.*, 69 N. Y. 345.

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## STURTEVANT v. BALLARD.

[9 JOHNSON, 337.]

**FRAUDULENT RETENTION OF PROPERTY SOLD.**—Property consisting of certain tools of trade was sold by a bill of sale for a consideration of a certain sum of money, and on consideration also that the vendor should retain its use for a period of three months. In the meantime it was levied on by an execution against the vendor, and sold as his property. It was held that the sale of the property unaccompanied with the actual delivery was fraudulent and void, as against creditors.

**AGREEMENT TO RETAIN POSSESSION OF GOODS SOLD.**—A voluntary sale of chattels, with an agreement contained in the deed, or out of it that the vendor may keep possession is, except in special cases, and for special reasons to be shown, and approved by the court, fraudulent and void as against creditors.

**FRAUD A QUESTION OF LAW.**—Fraud is a question of law, especially when there is no dispute about facts. It is the judgment of law on facts and intents.

**TRESPASS.** The case appears from the opinion. A verdict was taken for the plaintiff by consent, and the cause submitted without argument.

By Court, KENT, C. J. This case is not of much moment, in respect to the amount of property, but it is very important, as to the principle involved in the decision. The facts lie in a

narrow compass. Mecker, on the second of August, 1810, obtained judgment against Holt. On the twenty-ninth of August, Holt sold his goods and chattels, being a quantity of blacksmith's tools, to the plaintiffs, partly for cash, and partly to satisfy a debt due to them. The articles were specified in the bill of sale, and the bill contained an agreement, that Holt was to retain the use and occupation of the goods, for the term of three months. Just before the expiration of the term, and while the goods continued in the possession of Holt, they were seized by the defendant, as sheriff, by virtue of an execution issued on the judgment in favor of Mecker. The question arising upon this case is, whether the sale to the plaintiffs, under the above circumstances, was valid in law, as against the judgment-creditor. As between the parties to it, a sale of chattels unaccompanied by possession may be valid. It may even be valid as against a creditor, who was knowing and assenting to the sale. It was so ruled in *Steele v. Brown and Pary*, 1 Taunt. 381, but this is not such a case. Here was a judgment-creditor affected by the sale.

The statute of 13 Eliz. and which has been re-enacted with us, Sess. 10, c. 44, s. 2, makes void all grants, and alienations of goods and chattels, made with intent to delay, hinder and defraud creditors. This statute, as it has been frequently observed, by the English judges, was declaratory of the common law; and the true principles of law, in relation to such sales, are to be found in a series of judicial decisions, both before and since the statute of Elizabeth.

The great point is, whether the fact of permitting the vendor to retain possession of the goods did not render this sale fraudulent in law, notwithstanding such permission was inserted in the deed as a condition of the contract. If there had been no such insertion, but the sale had been absolute on the face of it, and possession had not immediately accompanied and followed the sale, it would have been fraudulent as against creditors, and the fraud in such case would have been an inference or conclusion of law, which the court would have been bound to pronounce. This is a well settled principle in the English courts. It is to be met with in a variety of cases, and especially in that of *Edwards v. Harben*, 2 T. R. 587; and it has been recognized and adopted by some of the most respectable tribunals in this country: *Hamilton v. Russell*, 1 Cranch, 303; *Davies v. Cope*, 4 Binn. 258. But it by no means follows that such a sale, with such an agreement attached to it, and appearing on the face of

the deed, is necessarily valid. There must be some sufficient motive, and of which the court is to judge, for the non-delivery of the goods, or the law will still presume the sale to have been made with a view to "delay, hinder or defraud creditors." Delivery of possession is so much of the essence of the sale of chattels, that an agreement to permit the vendor to keep possession, is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. This was a voluntary sale, made by the debtor, soon after the judgment against him, and made to a creditor, partly for cash and partly to satisfy an old debt; and why was the sale made three months before possession was to be delivered, if it was not to defeat the intermediate execution of the judgment-creditor? There is no assignable reason appearing for the arrangement, and the time of delivery might have been postponed for three years as well as for three months. The instances in which a sale of chattels, unaccompanied with delivery, has been held valid, are all founded upon special reasons, which have no application to this case. In *Stone v. Grubbam*, 2 Bulst. 225, Lord Coke makes a distinction between an absolute and a conditional sale of chattels, and he says, "that if it was an absolute conveyance, and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent." This case related to a lease for years of land; and in *Edwards v. Harben*, Mr. Justice Buller considers this as a well settled distinction, applicable generally to the sale of personal chattels. We are not, however, to understand the meaning of these cases to be, that a conditional sale of chattels, unaccompanied with possession, is *per se* a good sale. It is only good in special cases, and all the instances referred to by Buller, in illustration of the distinction, are of that special character. A conditional as well as an absolute sale, may equally be fraudulent in point of law, as well as fraudulent in fact, unless the intent of the parties in creating the condition be sound and legal.

Neither the statute of 13 nor that of 27 Eliz. makes any distinction between conditional and absolute sales. The case of *Ryan v. Rolle*, 1 Atk. 165; 1 Ves. 359, arose under the bankrupt act of 25 Jac. 1, which has a special provision, rendering liable to the commission, goods in possession of the bankrupt, by the consent of the true owner. The decisions under that act are therefore not strictly applicable to cases arising under the statute of Elizabeth; but the opinions given in that case were extremely elaborate, and led the judges to an examination

of the whole law respecting fraudulent sales. Mr. Justice Burnett observed that there was no reason for a distinction, either at common law or under the statute of Elizabeth, between conditional and absolute sales of goods, if made to defraud creditors, and that it was difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit.

The cases in which a postponed delivery has been allowed, are all of them special, as I have already observed. *Bucknal v. Roiston*, Prec. in Cha. 285, the goods were sold to A., the lender of money on bottomry, and the sale was in the nature of a mortgage or security for the loan, and he trusted B., the borrower, to negotiate and sell the goods for A.'s advantage. The lord chancellor held the sale good, even against a judgment-creditor, as the trust appeared upon the face of the bill of sale, and it was not to give a false credit, but for a particular purpose agreed upon at the time of sale. In *Cole v. Davies*, 1 Ld. Raym. 724, it was ruled by Holt, C. J., that if goods of A. are seized upon *fi. fa.*, and sold to B. *bona fide*, and for a valuable consideration, though B. permits A. to have the goods in his possession, upon condition that A. shall pay to B. the money as he shall raise it by the sale of the goods, this will not make the execution fraudulent, and a subsequent act of bankruptcy by A. would not defeat the sale. This case carried the permission of retaining the possession to the greatest length perhaps of any in the books. The last observation of Lord Holt was clearly inaccurate, as it is contrary to the provision in the statute of James, and contrary to what was said by the lord chancellor in the preceding case; but the case itself is confirmed by a late decision of the C. B., in *Kidd v. Rawlinson*, 2 Bos. & P. 59. It was there decided that the purchaser at a sheriff's sale may leave the goods in the possession of the defendant, out of benevolence, and for a temporary and honest purpose. But Lord Eldon distinguished that case from one of a creditor buying goods to satisfy his own debt, and he places reliance on the circumstance that the parties did not stand in the relation of debtor and creditor. He said that the purchaser might be considered as the donee of the goods, lending money to the original defendant to purchase them through the medium of the sheriff, and taking a bill of sale as a security for the money. In such cases it has been frequently said not to be absolutely fraudulent, or not so in point of law, to permit the donor to continue in

possession. The only inquiry would be as to matter of fact, whether the transaction was really and intrinsically fair and honest.

The case of *Bucknall v. Roiston* is analogous in principle, and more especially the case of *Maygott v. Mills*, 1 Ld. Raym. 286, where it was held by the K. B. that if one man lends another money to buy furniture, and takes a bill of sale of the furniture, leaving it in the vendor's possession, and the contract be honest, it is then valid; though the court said it would not be so if the goods had been assigned to any other creditor, and the possession had been retained.

The same doctrine, accompanied with the same instruction, has been laid down in Pennsylvania, in the case of *Waters v. McClellan*, 4 Dall. 208. Shippen, C. J., there observed that "in the case of a voluntary sale of goods, the law, both in Pennsylvania and England, regards the continuance of the debtor's possession as a badge of fraud. In England, the law is the same where the sale is made by the sheriff; but in Pennsylvania, a different rule in that case has prevailed; and where a relative, or friend, after a fair purchase at public sale, leaves the goods in the occupation and use of the debtor, it never has been deemed a fraud upon creditors." The learned judge who pronounced that decision could not have recollected the point ruled by Lord Holt, in *Cole v. Davies*, and he could not have known of the decision of Lord Eldon, for the two decisions were concurrent in point of time.

The cases of marriage settlements form another exception to the general rule. In those cases the goods are conveyed to trustees for the use of the wife, and the law which countenances those settlements, permits the wife, as *cestui que trust*, to have the possession as part of the trust, as essential to the object of the settlement, and as being considered the same as possession by the trustees. The case of *Haselington v. Gill*, 3 T. R. 620, in *notis* of *Cadogan v. Kennet*, Cowp. 432, and many others which might be referred to, all proceed upon this principle, and they, of course, have no bearing upon the present question. Indeed, there is no case which sanctions such a sale as the one in the present instance; for here no reason whatever appears for withholding delivery of possession, and the sale must, therefore, be considered in judgment of law as fraudulent and void against the creditor. Fraud is a question of law, and especially when there is no dispute about the facts. It is the judgment of law on facts and intents, as has been fre-

quently observed by judges of the greatest eminence. The length of time for which the possession is to be withheld is not material and does not affect the principle. Thus, in the late case of *Paget v. Perchard*, 1 Esp. N. P. 205, the sheriff was sued for seizing goods in execution, which had only the day before been sold by bill of sale to the plaintiff, as assumed creditor, but who had suffered the goods to remain with the defendant, and to be used as his own. Lord Kenyon ruled that this sale was fraudulent in law, as against a *bona fide* execution, and nonsuited the plaintiff. A like decision was made by Lord Ellenborough, in the similar case of *Wordall v. Smith*, 1 Campb. N. P. 332.

The general principle involved in this discussion is extremely important to the commercial interests of the community, and to confidence and integrity in dealing. The law in every period of its history has spoken a uniform language, and has always looked with great jealousy upon a sale or appropriation of goods, without parting with the possession, because it forms so easy and so fruitful a source of deception. Lord Kenyon said that he lamented that it was ever decided that the possession and apparent ownership of personal property might be in one person, and the title in another, and he thought it would have been better for the public, if the possession of such property (except in the case of factors), were to carry the title: 7 T. R. 234. The value of the principle and its necessity were perceived and felt as early as the age of Glanville, for he observed, when speaking of pledges, Lib. 10, c. 8, that "when a thing is agreed to be placed in pledge, by a debtor to a creditor, and delivery does not follow, it becomes a question what shall be done for the creditor in that case, since the same thing may be pledged to other creditors, both before and after. And it is to be observed that the court will not regard such private arrangements, nor intermeddle with it, or sustain a suit thereon." This was acknowledging the mischief and admitting the remedy under the same enlightened view of public policy and private interest, which some of the decisions of Lord Mansfield announce, at the period of the full growth and maturity of the commercial system. There is also a case in the book of assizes, f. 101, pl. 72; 22 Edw. III., which is much to the present purpose. An action of trespass was brought for wrongfully taking some cattle, and the jury found the defendant had received from the bailiff the beasts, on an execution which had issued for him against one B., and that the beasts belonged to B. at the time of the judgment,

and that he afterwards, by deed, gave them to the plaintiff to delay the execution; and the jury being required by the court to say who took the profits of the same beasts in the meantime, they answered that the donor did. Then Thorpe, J., declared: "I conceive the gift to be of no value, and I hold that he to whom such gift was made was only keeper of the beasts, to the use of the other, because there was fraud, etc., for otherwise a man could never have execution of chattels; wherefore, take nothing by your bill."

We may, therefore, safely conclude that a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession is, except in special cases, and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors. This is clearly not one of those cases, and the defendant is, therefore, entitled to judgment.

Judgment for the defendant.

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The doctrine laid down in this case, that a voluntary sale of chattels, with an agreement, in or out of the deed, that the vendor may keep possession, is, except in special cases and for special reasons to be shown to and approved of by the court, fraudulent and void as against creditors, is an interpretation of the case of *Edwards v. Harben*, 2 T. R. 587, and has been a subject of great diversity of opinion in subsequent decisions in the state of New York. In *Bissell v. Hopkins*, 3 Cow. 166, the court, commenting upon the language of Chief Justice Kent in the principal case, say: "The learned judge no doubt intended to say that possession continuing in the vendor is only *prima facie* evidence of fraud and may be explained." But in *Jennings v. Carter*, 2 Wend. 446, *Sturtevant v. Ballard* was approved; and in *Diver v. McLaughlin*, Id. 596, the case of *Bissell v. Hopkins* regarded as going entirely upon its own peculiar circumstances. It is of little or no practical value to trace the subsequent adjudications prior to the adoption of the revised statutes. In 2 R. S. 136, section 5, it is enacted that "every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment; that the same was made in good faith and without any intent to defraud such creditors or purchasers." Numerous cases arose under this act as to whether the presumption of fraud was one for the decision of the court, or ought to be submitted to the jury upon the facts. In the court of errors, in *Smith v. Acker*, 23 Wend. 653, it was held that the burden of proof was thrown upon the vendee or mortgagee to show the *bona fides* in the case of continued possession by the vendor or mortgagor of chattels, and that the fraudulent intent was a question of fact and should be submitted to the jury

In *Cole v. White*, 26 Wend. 511, the subject underwent a thorough examination, and the doctrine of *Smith v. Acker* was approved. It was there held that the want of change of possession subjected the transaction *prima facie* to the imputation of fraud, and that all the facts tending to show the absence of an intent to defraud creditors should be submitted to the jury. Following this decision, *Hanford v. Archer*, 4 Hill, 271, contained an elaborate review of the reasons set forth in prior cases, and as an interpretation of the revised statutes held that the jury were to judge of the fair or fraudulent intention. In *Vance v. Phillips*, 6 Hill, 433, Bronson, J., delivering the opinion of the court, acknowledges that, by force of authority, "however clear and conclusive the evidence of fraud may be, it must be left as a question of fact to the jury," but adds: "If the jury come to a wrong conclusion we must, as we do in other cases, grant a new trial." The case of *Mitchell v. West*, 55 N. Y. 107, considers the case of *Hanford v. Archer* as conclusive upon the point that, having shown that the sale of the chattels was *bona fide*, and that there was no intent to defraud creditors, it was unnecessary to show some valid excuse for leaving the goods in the vendor's possession.

An interesting case, *Tilson v. Terwilliger*, 56 N. Y. 273, besides affirming the right of the jury to pass upon the *fides* in a sale of chattels, also holds that the sale must be accompanied by a continued change of possession to avoid the presumption of fraud; and when it appears that the chattels came again into the possession of the vendor with the knowledge and assent of the vendee, no matter how long the interval between the original sale and transfer of possession, and the subsequent regaining of possession by the vendor, it devolves upon the vendee to show that the transaction was in good faith, and with no intent to defraud. Recent decisions in the supreme court of New York follow *Hanford v. Archer*, and make it manifest that it is now the accepted law in that state, that where possession is retained by the vendor or mortgagor of chattels, the presumption of fraudulent intent may be rebutted by evidence, and is a question to be submitted to the jury: *Hollacker v. O'Brien*, 5 Hun, 277; *Schoonmaker v. Vervalen*, 9 Id. 138.

Upon this question of the retention of possession by the vendor of chattels, there has been much diversity of opinion in the various states, whether or not such retention was of itself fraud *per se*, or merely *prima facie* evidence of fraud. In the note to *Twyne's case*, 1 Smith's Leading Cases, 47, the decisions in the different courts of the Union, and the doctrines prevailing in many of the states, have been collated and ably reviewed. For later adjudications, see the 2d Am. Edn. of Benjamin on Sales, sec. 487, n. (h.), and 502, n. (k.), *et seq.*

## MARTIN v. PAYNE.

[9 JOHNSON, 387.]

CONSTRUCTIVE SERVICE IN ACTION FOR SEDUCTION.—A daughter of the age of nineteen years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work, but there was no agreement for her continuance in his house for any time. While at her uncle's house she was seduced and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him, though if the misfortune had not have happened, she had no intention of

returning to her father. It was held that there was such a constructive service on behalf of the father as entitled him to maintain the action for seduction.

TRESPASS for debauching plaintiff's daughter, and getting her with child. It appeared that, at the time of her seduction, the daughter was nineteen years of age, and that she was living with her uncle, for whom she worked when she pleased, receiving therefor one shilling per day, although she was under no engagement to work for her uncle for any specified time; that she went to her uncle's with her father's consent, who, however, never released his right to her services; and that had it not been for her misfortune, she did not intend to return to her father's house. Immediately after she was debauched, she returned to her father, who maintained her, and was at the expense of her lying-in. Verdict for the plaintiff, subject to the opinion of this court.

*Skinner and J. Russell*, for the plaintiff.

*Henry, contra*, relied upon *Dean v. Peel*, 5 East, 45.

By Court, SPENCER, J. The case of *Dean v. Peel*, 5 East, 45, is against the action. It was there held that the daughter being in the service of another, and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relation of master and servant did exist, from the legal control he had over her services; and although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it as a departure from all former decisions on this subject. It has frequently been decided, that where the daughter was more than twenty-one years of age, there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case. In *Bennet v. Alcott*, 2 T. R. 166, the daughter was thirty years of age, and Buller, justice, held that even milking cows was sufficient.

But where the daughter was over twenty-one, and in the service of another, as in *Poslewaite v. Parks*, 2 Burr. 1878, the action is not maintainable. In *Johnson v. McAdam*, cited by Topping in *Dean v. Peel*, Wilson, J., said that where the daughter was under age he believed the action was maintainable, though she was not part of her father's family when she was seduced,

but when she was of age, and no part of her father's family, he thought the action not maintainable. In *Fores v. Wilson*, Peake's N. P. Cas. 55, which was an action for assaulting the maid of the plaintiff, and debauching her, *per quod*, etc., Lord Kenyon held that there must subsist some relation of master and servant, yet a very slight relation was sufficient, as it had been determined that when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant. But the case of a gentleman's daughter at a boarding-school, debauched and gotten with child, on what principle can the father maintain the action, but on the supposed relation of master and servant, arising from the power possessed by the father to require menial services; for in such a case, there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that for such an injury the law offered no redress? The case supposed is perfectly analogous to the one before us; here the father merely permitted his daughter to remain with her aunt; he had not divested himself of his power to reclaim her services, nor of his liability to maintain and provide for her. She was his servant *de jure* though not *de facto*, at the time of the injury, and being his servant *de jure* the defendant has done an act which has deprived the father of his daughter's services, and which he might have exacted but for that injury. We are of opinion that the action is maintainable under the circumstances of this case, and therefore deny the motion for a new trial.

Motion denied.

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See *Coon v. Moffatt*, 4 Am. Dec. 392, and note, where this subject is examined at length.

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## YATES v. LANSING.

[9 JOHNSON, 395.]

**LIABILITY FOR JUDICIAL ACTS.**—Where the chancellor committed one of the officers of the court of chancery for malpractice and contempt, and a judge of the supreme court in vacation on *habeas corpus* discharged the prisoner, and the chancellor afterwards recommitted him for the same cause, it was held that the chancellor was not liable to an action at the suit of the officer for the penalty given by the *habeas corpus* act; for a judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment.

WRIT of error from the supreme court to the court of errors. The action was debt brought by Yates against Lansing, the chancellor of the state, to recover the penalty of twelve hundred and fifty dollars under the fifth section of the *habeas corpus* act which declares: "that no person who shall be set at large upon any *habeas corpus* shall be again imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause; and that if any person shall knowingly, contrary to this act, recommit or imprison, or cause to be recommitted or imprisoned, for the same offense, or pretended offense, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved twelve hundred and fifty dollars, any colorable pretense or variation in the warrant of commitment notwithstanding."

The declaration alleged the arrest of plaintiff, a master in chancery, by a writ of attachment issuing out of the court of chancery, the suing out of a writ of *habeas corpus* under the seal of the supreme court, and a discharge upon the return thereof, and a subsequent second recommitment and imprisonment of plaintiff under a writ of attachment issued, for the same cause as set forth in the prior attachment, by the defendant, who well knew of the discharge under the writ of *habeas corpus*. The plea admitted the facts as alleged in the declaration, but averred that the recommitment was done by defendant while acting judicially, and in no other capacity. To this plea there was a demurrer, which was decided in favor of the defendant in the court below. The offense for which the attachment originally issued against plaintiff, was malpractice and contempt of court.

*Rodman, Van Buren and T. A. Emmet*, for the plaintiff in error.

*Henry and Van Vechten*, contra.

PLATT, Senator. In examining this interesting case, two cardinal points are presented: 1. Had the chancellor a right to recommit the plaintiff after the discharge by Mr. Justice Spencer? 2. If he had no right, is he liable for the penalty now claimed?

The consideration of the first question involves an inquiry:

1. Whether the original commitment by the chancellor was legal?

2. Whether Mr. Justice Spencer had a right to revise the adjudication of the chancellor in the matter of complaint against

John V. N. Yates, and discharge the prisoner on *habeas corpus*?

3. Whether the recommitment of Mr. Yates by the chancellor, after the actual discharge by Mr. Justice Spencer, was lawful?

Before I proceed to examine these questions it is proper to notice a preliminary objection insisted on by the counsel for Mr. Yates. They contend that the door to these inquiries is now shut, by the decision of this court, at its last session, in the case of *John V. N. Yates v. The People*. I cannot admit the doctrine of immutability in the decisions of this court to the unqualified extent claimed by the plaintiff's counsel. The decisions of courts are not law; they are only evidence of the law. And this evidence is stronger or weaker, according to the number and uniformity of adjudications, the unanimity or dissension of the judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. The weight and authority of judicial decisions depend also on the character and temper of the times in which they are pronounced. An adjudication at a moment when the turbulent passions or revolutionary frenzies prevail, deserves much less respect than if it were made at a season propitious to impartial inquiry and calm deliberation.

The peculiar organization and practice of this court renders it difficult to establish a system of precedents. In the supreme court the judges confer together, compare opinions, weigh each other's reasons, and elicit light from each other. If they agree, one is usually delegated by the other, not only to pronounce judgment, but to assign reason for the whole bench. But even in that court, and in the courts of Westminster Hall, the judges who silently acquiesce in the result, do not consider themselves bound to recognize as law all the *dicta* of the judge who delivers the opinion of the court.

In this court, the members never hold any previous consultation together; we vote for the most part, as in our legislative capacity. Few assign any reasons, and fewer still give written opinions which may be reported. For these reasons, I think it would be extravagant and dangerous to consider the *dicta* and opinions of a single member as settling definitely the law of the land, on all the points on which he chooses to give opinions or to assign reasons. In the case of *J. V. N. Yates*, at the last session, only one member, Mr. Clinton, gave a written opinion or assigned reasons for reversing the judgment of the supreme court: 6 Johns. 496. A majority of the members voted for

reversing that judgment; but whether upon the grounds taken and the reasons assigned by Mr. Clinton, it is impossible to know. It is certain that a majority agreed in the result; but there is no certainty that any two of that majority grounded their opinions on any one of the various points that were discussed and relied on by Mr. Clinton. One point insisted on in the eloquent opinion of that senator, was that the recommitment by the chancellor was by order, and that it ought to have been by attachment: 6 Johns. 512. This was as material a question in the former record. It may be that the other members of the court who voted for the reversal of that judgment, rested their opinions on that point alone; and if so, that decision has no bearing on the present question.

This suit is for the penalty for recommitting after a discharge on *habeas corpus*, and the question is not as to the mode, but as to the right of recommitting. If the recommitment was "knowingly contrary to the statute," it is immaterial whether it was by order or by attachment; for the defendant is equally liable in both cases. If that question were material in this case, it might be shown that courts of record may commit by order or by writ, but a magistrate, not sitting as a court of record, can commit only by warrant under his hand and seal: 2 Hale's P. C. 122; *Taylor v. Beal*, 2 Roll. Abr. 559.

Considering the questions which now arise, as not necessarily prejudiced by the former decisions of this court, I shall now proceed to examine them, on the general grounds of reason and authority. The right of punishing for contempts by summary convictions, is inherent in all courts of justice and legislative assemblies; and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our state constitution. The discretion involved in this power is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice. The known existence of such a power prevents, in a thousand instances, the necessity of exerting it; and its obvious liability to abuse, is, perhaps, a strong reason why it is so seldom abused. This power extends not only to acts which directly and openly insult, or resist the powers of the court, or the persons of the judges, but to consequential, indirect and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court: 4 Bl. Com. 280; 2 Hawk. b. 2, c. 22; 1 Com. Dig. Attachment, A.

The officers of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence or abuse in their official capacity: 1 Bac. Abr. tit. Attachment; 2 Hawk. tit. Attachment; 3 Atk. 568. A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor on indictment, or not. To challenge a senator or a judge, may, under circumstances, be a contempt; but is certainly indictable. A conviction on indictment will not purge the contempt, nor will a conviction for contempt be a bar to an indictment. The offense may be double, and so are the remedy and the punishment. For instance, assaults in the presence of the courts, rescous, extortion, libels upon the court or its suitors relating to suits pending, forging a writ, etc., are indictable offenses, and certainly they are also contempts. Contempts are never merged in statute offenses, without express words for that purpose. In this case it appears that a complaint was made to the chancellor against the plaintiff, by Samuel Bacon, a suitor founded on his own affidavit, and the affidavit of Peter W. Yates and Richard S. Treat, charging that the plaintiff, being a master in chancery, filed a bill on behalf of Samuel Bacon, and subscribed to it the name of Peter W. Yates, one of the solicitors of that court, without the knowledge or consent of P. W. Yates; and had acted as solicitor in the prosecution of the cause, under the assumed name of P. W. Yates. It, also, appears by the order of conviction, that the plaintiff "was regularly required" to answer this complaint before the chancellor; and that he did not appear to answer it. Whereupon the chancellor made an order in the minutes of the court, "that the bill be dismissed, that the said John V. N. Yates pay all the costs accrued in the suit; and that the said J. V. N. Yates be committed for his said malpractice and contempt." An attachment accordingly issued; and the plaintiff was arrested and imprisoned under it.

After reciting the facts charged against the plaintiff in the order of conviction and in the attachment, these words are added, "contrary to the statute in such case made and provided, in willful violation of his duty as master, and in contempt of the authority of this court."

The question here presented is, whether the chancellor had a right to make this order and to issue this attachment? I am of opinion that the order is clearly a conviction for a contempt,

and in legal construction imported nothing more. The words, "contrary to the statute, in willful violation of his duty as master, and in contempt of the authority of this court," in the connection in which they stand, are mere expletives, showing a strong sense of the indignity offered to the court; but are not a substantive ground of conviction. If those words had been omitted, the conviction would have been complete; and I think its legal import is the same, with or without those words.

Suppose that instead of those words, the order had stated that the facts charged were "contrary to the precepts of our holy religion," would it be contended that the order was void, and that the chancellor had usurped ecclesiastical powers? Suppose he had stated that the conduct of Mr. Yates was "contrary to the laws of all civilized countries," would it be said he had assumed universal jurisdiction under those laws? The attachment recites the order or adjudication of conviction, and, "therefore," commands the sheriff to imprison John V. N. Yates, "until the further order of our said court." I consider this writ as an attachment for a contempt; and I think it a distortion of its plain import, to say that it implies any assumption of criminal jurisdiction, or that the chancellor held cognizance of, or meant to punish, the acts complained of as a statute offense.

That the acts of fraud, imposition and extortion, of which Mr. Yates was so convicted, amounted, in judgment of law, to a high-handed contempt, I have no doubt; and that it was the right and duty of the chancellor to punish him for it, and to compel him summarily to reimburse the money he had extorted from the suitor, is equally clear. It is contended that the attachment is illegal, because it was founded on conviction, without an examination on interrogatories. To this objection, several answers occur.

1. It does not appear from the attachment whether there was such an examination or not; nor does the law or usage require that the whole proceedings which led to the conviction should be recited in the attachment.

2. If we recur to the conviction, or order for the attachment, it appears that Mr. Yates refused to answer the complaint, "although regularly required so to do;" and I think such refusal to answer is not only a waiver of the right of being examined on interrogatories, but an admission that the complaint was well founded.

- 3 That the chancellor had a right to dispense with such ex-

amination, if in his judgment the proof by affidavits is sufficient in itself, and of such credit as that a denial by the party accused, under oath, would not countervail the affidavits: *King v. Vaughan*, Doug. 516; 4 Bl. Com. 284.

4. We are not now deliberating on an appeal from chancery. We must confine ourselves to the record brought here by the writ of error. The only question is, whether the judgment of the supreme court is right; and, of course, we have no more power to examine the proceedings which led to the conviction, or the grounds of the adjudication in chancery, than the supreme court had. If there was no essential defect on the face of the attachment, and it purported to be an attachment for a contempt, we are bound to presume that the conviction on which it issued was regular and well founded.

The last objection to the original commitment is, that it was "until the further order of the court," and therefore it is not definite and terminable, either by the efflux of time or on the doing of some act by the prisoner.

The object of this commitment was to compel remuneration to the injured suitor, and also to punish Mr. Yates for contemning the authority of the court, and polluting the streams of justice. It was impossible to foresee when he would indemnify the suitor, and make satisfactory atonement for his affront to public justice; there seems, therefore, an obvious propriety in directing the imprisonment "until the further order of the court." It is equivalent to saying, as in common warrants, "until he be delivered by due course of the law." It is, in fact, as definitive as the nature of the case would admit; for if it had been, "until he makes satisfaction to the injured party, and acknowledges his contrition for his offense," the court must at last judge of the compliance; and it would in either case be, in effect, during the pleasure of the court. I think it, however, a sufficient answer to say, that the precedents uniformly agree with the form of this attachment in that respect, and that the established usage in all our courts, and in the English courts, distinctly traced back to the Year Books, also corresponds with it. This long usage proves that it is wise and safe. But if it be in itself wrong, we have a right to apply the maxim, *communis error facit jus*.

The commitment of George Clarke for a contempt, at the last session, was "during the pleasure of the senate." It has been said that "such an imprisonment ceases with the adjournment of the legislature, and is, therefore, terminable on the happen-

ing of that event:" *Opinion of Clinton, senator*, 6 Johns. 506, 507. But to this it may be answered, that the imprisonment does not necessarily, or of course, cease with the adjournment. The prisoner can then be released only on *habeas corpus*; and I trust it will not be contended that a commitment is legal, wherever it leaves the prisoner liable to a discharge on *habeas corpus*. Besides, the adjournment of the legislature depended on their own volition, subject only to the right of prorogation by the governor. It was, therefore, an imprisonment during pleasure in the largest sense, and not terminable by the efflux of time. There was no certainty that the senate would ever adjourn. The house of assembly expires annually, but the senate exists in perpetuity. I have now arrived at the conclusion that the imprisonment of Mr. Yates was a legal commitment, upon a conviction for a contempt.

The next question is whether Mr. Justice Spencer had a right to discharge Mr. Yates on *habeas corpus* from his imprisonment under the attachment of the court of chancery? Sergeant Hawkins, b. 2, c. 15, s. 73, 76, shows that the superior courts pay the highest regard to each other's decisions, and will presume them to be agreeable to law, unless the contrary expressly appears. Since the violent contest between the court of chancery and the king's bench, in the reign of James I., the English authorities uniformly show a scrupulous forbearance in their courts to interfere with each other's proceedings in matters of contempt. The case of *Chambers*, Cro. Car. 168, exemplifies this remark. He was committed for a contempt, and upon being brought into the king's bench, on *habeas corpus*, he was remanded, and the court said, "It is not the usage of this court to deliver one committed by the decree of one of the courts of justice." Such has been the uniform tenor of English decisions down to the era of our independence. This principle has been so fully recognized by our courts that no question has arisen upon it before the present case. It is founded on this strong reason, that these superior courts are co-ordinate. Equal confidence is reposed in their learning and integrity; and it is, therefore, unfit that one should assume a right to judge of the other's proceedings, especially as the constitution has provided a tribunal for the express purpose of correcting their errors. Such an exercise of power by the supreme court would distort the symmetry and proportion of our system of appellate jurisdiction; but the deformity is still more glaring when the power is exercised by a judge in vacation.

The case of *Gist v. Bowman*, 2 Bay, 182, in the supreme court of South Carolina, in the year 1798, bears a strong analogy to the present case. Bowman was committed for a contempt, by an order of one of the three chancellors, who compose the court of chancery in that state; and being brought before the supreme court, on *habeas corpus*, a question was made whether one of the three chancellors was competent to make such an order of commitment; and it was unanimously decided that the prisoner was not entitled to be discharged by the common law judges; that the *habeas corpus* act did not embrace the case; that the supreme court had no jurisdiction, and that they ought to refer the question to the court of chancery. This doctrine is great authority, because it was made by the highest tribunal of a sister state, whose civil institutions are congenial with our own. It seems to be conceded that a judge in vacation had no power, at common law, to allow a *habeas corpus*, or to make any order in relation to it. His power in that respect is derived solely from the statute called the *habeas corpus* act. Judge Spencer, in this instance, marked the writ "by statute," and thereby evinced that he claimed jurisdiction under the statute only. I cannot perceive any difference between our *habeas corpus* act and that of Great Britain, in relation to the point now before us. Whether a judge in vacation has any powers under this statute, other than to bail persons committed for trial, or to keep the peace, and answer indictments, is a question which perhaps need not be decided in this cause. There seems, however, strong ground to conclude that his power "extends only to cases of commitment for such criminal charge as can produce no inconvenience to public justice by a temporary enlargement of the prisoner; all other cases of unjust imprisonment being left to the *habeas corpus* at common law," which can only be issued in term: 3 Bl. Com. 137; 10 Mod. 429. It is, however, very clear from the express exceptions in the statute that a judge, in vacation, has no right to discharge "persons convict, or in execution by legal process."

In examining the original commitment by the chancellor, my judgment is satisfied that it was neither more nor less than a commitment on a conviction for a contempt. I am therefore obliged to conclude that the decision of his honor, Judge Spencer, was erroneous on that point. I think Mr. Yates was, in the true sense of the third section of the *habeas corpus* act, "a person convict, or in execution by legal process," and, therefore, expressly within the exception to the powers given to the

judge by the statute under which he discharged the plaintiff. Mr. Yates was, however, actually discharged by Judge Spencer; and this brings me to the next inquiry, whether the recommitment by the chancellor, after the actual discharge by Mr. Justice Spencer, was lawful?

The fifth section of the *habeas corpus* act declares, "that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause." I think Mr. Justice Spencer exceeded his jurisdiction in discharging Mr. Yates, and, of course, that discharge was unauthorized and void. It had no more legal operation or effect than if the *habeas corpus* act had never existed; and the right of recommitment by the chancellor rests on the same footing as if Mr. Yates had been discharged on the order of any private citizen. In discharging Mr. Yates, Judge Spencer acted ministerially, or if judicially, he acted as a court of limited and special jurisdiction under the statute, and the proceeding was *coram non judice*. In my judgment, the chancellor had originally "jurisdiction of the cause," that is, of the cause of commitment, which was for malpractice and contempt; and, of course, this presents a case clearly within the exception in the fifth section of the statute. If it be a case within that exception—if Judge Spencer acted extra-judicially, in discharging the prisoner—it seems to me against sound legal discretion to contend that such a discharge, by a person having no right to make it, can be effectual and conclusive to rescue a prisoner in execution for a contempt, and to exculpate him from the guilt established by his conviction. The court of chancery not only had "jurisdiction of the cause," but exclusive jurisdiction. No court can punish for contempts of another court. And if the discharge by the judge is conclusive, whether right or wrong, and whether he had jurisdiction or not, it must result that a man who stands convicted of a gross contempt against the court of chancery, and a daring affront to public justice, may, without satisfaction and without pardon, escape all punishment, and bid defiance to all the constituted authorities of the state. Such a doctrine would go to prove that a judge in vacation has not only a power to revise the decisions of every court in the state, but that, in effect, he may exercise the power of pardoning convicts. Suppose a person convicted of murder or treason, and, on writ of error, the supreme court pronounce

judgment of death, and the executive refuses to respite the sentence, can the idea be tolerated that a judge of the supreme court, in vacation, or a recorder of New York, Albany or Hudson (who have equal powers), may conclusively discharge the culprit on *habeas corpus*, at the moment of execution.

Such a despotic control over judicial decisions and executive discretion, would indeed secure the personal liberty of one man, but its inevitable tendency would be to enslave millions. For these reasons, I think the chancellor had a perfect right to recommit Mr. Yates for the same offense. He was equally liable to recommitment as if he had escaped from prison, or been rescued by violence. But if I am mistaken in every position which I have laid down, there still remains this solemn and important question: Is the defendant responsible, in this action, for acts done by him officially and judicially as chancellor of this state? In order to give a just construction of the fifth section of the *habeas corpus* act, which gives the penalty claimed by the suit, it is necessary to examine the law generally in regard to the responsibility of judicial officers. Sergeant Hawkins, b. 1, c. 7, s. 6, lays down this general rule, "that the law has freed the judges of all the courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts as judges." The English authorities, from the year-books down to the present day, uniformly establish and fortify this doctrine, that where courts of special and limited jurisdiction exceed their rightful powers, the whole proceeding is *coram non jndice*, and all concerned in such void proceedings are liable to an action by the party injured: *Case of Marshalsea*, 10 Co. 68; *Terry v. Huntingdon*, Hard. 480. But in the case of *Miller v. Seare*, 2 Bl. 1141, Lord Chief Justice De Gray said, "that the judges of the courts of general jurisdiction were not liable to answer personally for their errors in judgment. The protection as to them is absolute and universal; with respect to the inferior courts, it is only while they act within their jurisdiction." In support of this doctrine, I refer generally to Book of Assise, 27 Edw. III., pl. 15; 9 Hen. VI. 60, pl. 9; 9 Edw. IV., 3 pl. 10; *Floyd v. Barker*, 12 Co. 23; *Hire v. Sedgwick*, 2 Roll. 109; *Hammond v. Howell*, 1 Mod. 184; *Groenvelt v. Burwell*, 12 Id. 286; 1 Salk. 396; 1 Ld. Raym. 454; *Miller v. Seare*, 2 Bl. 1145; *Mostyn v. Fabrigas*, Cowp. 172.

This rule has been invariably acknowledged as law in this state; 2 Caines', 312; and has been recognized and supported by our sister states. In the Case of *Phelps v. Sill*, in the 'su-

preme court of Connecticut, 1 Day's Cases in Error, 315, a suit was brought against a judge of probate, for omitting to take security from a guardian, and the court held that the action would not lie. They said: "It is a settled principle that a judge is not to be questioned in a civil suit, for doing, or for neglecting, or refusing to do, a particular official act in the exercise of judicial power."

In the case of *Lining v. Bentham*, in the supreme court of South Carolina, 2 Bay's, 1, in 1796, it was unanimously decided that a justice of the peace may commit for a contempt; that his warrant of commitment under his hand and seal was the best evidence of the contempt, and that he was not liable to an action for what he did in his judicial capacity, though he was subject to indictment if he acted oppressively. The same court, in 1796, in *Brodie v. Rutledge*, 2 Bay, 69, held that it was a well settled rule of law that no suit would lie against a judge for any judgment rendered by him in his judicial character, though liable to impeachment. Our statute is a transcript from the English *habeas corpus* act, and Serjeant Hawkins, in his learned exposition of that statute, Hawk. b. 2, c. 15, s. 24, says: "The *habeas corpus* act makes the judges liable to an action at the suit of the party, in one case only, viz., in refusing to award a *habeas corpus*, and seems to leave it at their discretion, in all other cases, to pursue the directions of the act in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeiture."

The fifth section gives a penalty against "any person who shall knowingly, contrary to this act, recommit or imprison for the same offense, or pretended offense, any person so set at large," etc. I consider this section as having no application to the chancellor or judges, in their judicial character. This penalty applies only to magistrates and others who act ministerially as conservators of the peace, or who commit for trial, or to answer indictments. If the penalty for recommitting applies to the chancellor, while sitting as a court of chancery, it must equally apply to all the judges of the supreme court sitting together in term; and if the penalty be incurred by the supreme court, composed of five judges, how are they to be sued jointly or severally? If the judges, or a majority of them, are liable to be sued as a court, before what tribunal are they to be sued? If in the court of common pleas, do the parties lose the benefit of a writ of error to the supreme court? Or are the judges to

sit in judgment on themselves? These absurd consequences evince that, as courts, they were never intended to be made responsible to the party in a private suit. Consider them liable in their ministerial capacity only, and the construction of this statute accords with the established and revered principles of the common law.

The authorities cited show the general reason and policy of the law maintaining judicial inviolability, and surely we ought not to adopt a construction of this statute abhorrent to every principle of justice and sound policy, unless that interpretation be imperiously required by the express and unequivocal terms of the statute. In this case the defendant acted in his judicial character, "as chancellor, and not otherwise." There is no pretense that he acted from corrupt motives; on the contrary, it is expressly admitted that his intentions were pure. That a chancellor or judge of the supreme court shall be compelled to decide new and difficult questions of law or equity, at the peril of incurring a severe penalty, if they happen to decide wrong; that pure intentions and honest endeavors to perform their official duties shall afford them no protection, are propositions repugnant to reason and humanity, and cannot be law. The *habeas corpus* act is justly prized as one of the bulwarks of freedom, and can be endangered only by its misapplication and abuse. Let us beware that in our zeal for securing personal liberty we do not destroy the virtuous independence and rightful authority of our courts of justice, and thereby subvert the foundations of social order. So long as our courts are pure, enlightened and independent, we shall enjoy that greatest of earthly blessings, a government of laws; but whenever these tribunals shall cease to deserve that character, the standard of justice and civil liberty must give place to the scepter of a tyrant.

My opinion is that the judgment of the supreme court ought to be affirmed.

PARIS, senator, concurred.

BRETT, BRUYN, HAIGHT, HALL, HOPKINS, HUMPHREYS, LEWIS, MARTIN, PHELPS, STEARNES, WHITE and WILLIAMS, senators, were also of opinion that the judgment of the supreme court ought to be affirmed, but did not state their reasons.

CLINTON, senator, delivered an opinion in favor of reversing the judgment. BLOODGOOD, GILBERT, SELDEN and SMALLY, senators, were of the same opinion.

YATES and TOWNSEND, senators, gave no opinion.

Judgment affirmed, with double costs.

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In the leading case of *Crepps v. Durden*, Cowp. 640, and reported in Smith's *Leading Cases*, the doctrine as to the liability of judicial officers when acting without jurisdiction was laid down, and this doctrine has ever since been followed by our courts. In *Randall v. Brigham*, 7 Wall. 535, Field, J., states the doctrine clearly when he says: It is a general principle applicable to all judicial officers that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts in excess of their jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority, and the destruction of its usefulness."

One of the most remarkable cases in this country, where this question is raised, is the case of *Lange v. Benedict*, which has lately been decided by the court of appeals in New York (March, 1878), and reported in the *Albany Law Journal*, vol. 18, p. 11. This case will hereafter be a leading case in this connection, because of the singularity of the facts, and the importance of the principles involved. The controversy was a heated one, and was determinedly carried on in the lower courts, until it finally reached the highest court. The defendant was United States district judge, and the plaintiff a reputable merchant in New York, was tried at a circuit court held by him upon an indictment for having certain mail bags in his possession, they being found on his premises. The jury found the plaintiff guilty, and found the value of the mail bags to be less than twenty-five dollars. The penalty under the statute was a fine of two hundred dollars, or imprisonment for one year. The defendant sentenced the plaintiff to pay a fine of two hundred dollars, and to be imprisoned for one year. The plaintiff was imprisoned five days, and he paid the sum of two hundred dollars to the clerk of the court as a fine, the same being paid over to the government. He procured a writ of *habeas corpus* returnable before the defendant, who held the same term of the court at which plaintiff was sentenced. The defendant, upon the return, vacated and set aside the sentence, and as a part of the same judicial act and order, passed judgment anew on the plaintiff, and re-sentenced him to be imprisoned for the term of one year, and the plaintiff was imprisoned. Under proceedings taken by plaintiff, to which the defendant was not a party, the re-sentence was set aside by the United States supreme court as being unwarranted by law. In an action for imprisonment under the re-sentence, brought by the plaintiff against the defendant, it was held that the act of defendant was done by him as a judge, and that he was therefore exonerated by his judicial character from any liability.

There was never perhaps a case where the doctrine of non-liability of judicial officers was carried so far; and the opinion of Folger, J., is therefore worth examination.

After noticing the history of the case, he says: "There are not many topics in the law which have received more discussion and consideration than

that of the liability of a person holding a judicial or quasi judicial office, to an action at law for an act done by him while at the same time exercising his office. The principles which should govern such action are, therefore, well settled. The difficulty in satisfactorily disposing of a particular case is not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie. The general rule which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: Such as are by law made judges of another shall not be criminally accused, or made liable to an action for what they do as judges; to which the year books (43 Edw. III. 9; 9 Edw. IV. 3) are cited in *Floyd v. Baker*, 12 Coke, 26. The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge, the proceeding is as nothing: *Perkins v. Proctor*, 2 Wils. 382-4, citing the *Marshalsea case*, 10 Coke, 65-76, which says: 'Where he has no jurisdiction, *non est iudex*.' It has also been stated thus: No action will lie against a judge acting in a judicial capacity for any errors which he may commit in a matter within his jurisdiction: *Gwynne v. Poole*, Lutw. 937-1160. It has been in modern days carried somewhat further in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly: *Bradley v. Fisher*, 13 Wall. 351. It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity, it must have been a judicial act. So it always remains to be determined when is an act done as judge in a judicial capacity?"

The opinion here inquires as to when a judge may be considered as acting in a judicial capacity, and proceeds: "Thus it appears that the test is not alone that the act is done while having on the judicial character and capacity; nor yet is it alone that the act is not lawful. We have seen too that the test is not that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority: *Bradley v. Fisher*, *supra*. We think it clear that there is no liability to civil action, if the act was done 'in a matter within his jurisdiction,' to use the words of *Gwynne v. Poole*, *supra*. Those words mean, that when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in *Hunt v. Hunt*, decided on the twenty-ninth of January, 1878. It is not confined within the particular facts which must be shown before a court or a judge to make out a specific and an immediate cause of action; it is as extensive as the general or abstract question which falls within the power of the tribunal officer to act concerning. Our idea will be illustrated by a reference to *Groenvelt v. Burwell*, 1 Ld. Raym. 454. There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was malpractice by him. He brought this action. They pleaded the character of a college, giving them power to make by-laws for the government of all practitioners in medicine in London; and to overlook them and to examine their medicines and prescrip-

tions, to punish malpractice by fine and imprisonment; that they had, in the exercise of that power, adjudged the plaintiff guilty of *malaprazis*, and fined him twenty pounds and ordered him imprisoned twelve months, *nisi*, etc. It was held that the defendant had 'jurisdiction over the person of the plaintiff, inasmuch as he practiced medicine in London; and over the subject-matter, to wit, *the unskillful administration of physic*.' That is the language of Holt, C. J., in that case. And because the defendants had power to hear and punish, and to fine and imprison, it was held that they were judges of record, and because judges not liable for the act of fining and imprisoning: See also *Ackerly v. Parkinson*, 3 M. & S. 411.

It is the general abstract thing which is the subject-matter. Thus in *Hammond v. Howell*, 2 Mod. 218, the defendant was saved from liability to civil action, inasmuch as he had as judge jurisdiction of the subject-matter, of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons; and he had jurisdiction of the subject-matter, and his error was a judicial error, an act done *quatenus* judge, not an act as Howell the private person, though it was an act contrary to law, grievous and offensive upon the citizen. "The inquiry, then, at this stage of our consideration of the case, is this: Whether the defendant, sitting upon the bench of the circuit court, and being on that occasion, *de jure et de facto* the circuit court, and having as such, jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance, whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge, whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the inquiry whether the act then done, as the act of the court was erroneous and illegal; that is but another form of saying, whether it could or could not be lawfully done as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act based upon them, would be lawful or unlawful."

After examining the question of jurisdiction, he proceeds to show that in this case there was merely an excess of jurisdiction, and then inquires whether admitting this defendant was still liable? The opinion then proceeds:

"This act of the defendant was then one in excess of or beyond the jurisdiction of the court. And though when courts of special and limited jurisdiction exceed their powers the whole proceeding is *coram non jndice* and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court, or one of general jurisdiction, for an act done by him in a judicial capacity: *Yates v. Lansing*; *Bradley v. Fisker*, *supra*; *Randall v. Brigham*, 7 Wall. 523. In the last cited case it is said of judges of superior courts: They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps they are done maliciously and corruptly; and in the other cases a distinction is observed and insisted upon between excess of jurisdiction and a clear absence of all jurisdiction over the subject-matter. And to the same effect is this: 'For English judges when they act *wholly without* jurisdiction \* \* \* have no privilege,' per Parke, B.: *Culder v. Holket*, 3 Moore, P. E. C. 28, 75. \* \* \* For these reasons we are of the opinion that the defendant is protected by his judicial character from the action brought by the plaintiff."

See the case of *Grumon v. Raymond*, *ante*, 200, and note.

## ELLIOTT v. ROSSELL.

[10 JOHNSON, 1.]

**LIABILITY OF COMMON CARRIERS BY WATER.**—Persons who undertake to carry goods for hire, whether the transportation be from port to port, or beyond sea, at home or abroad, are held to the same liability as other common carriers, being liable for all losses, not arising from inevitable accidents, or such as could not be foreseen or prevented.

**CAUSE OF LOSS A QUESTION OF FACT**—Whether the loss is to be attributed to that inevitable necessity not arising from the intervention of man, and which no human prudence could have avoided, is a question of fact for a jury to decide.

**ACTION on the case.** The defendants were common carriers between the ports on Lake Ontario and Montreal. The plaintiffs entered into a contract with the defendants for the transportation of ashes from Genesee river to Montreal, in pursuance of which fifty-seven barrels of ashes were put on board one of defendants' schooners. On the arrival of the property at Ogdensburgh where articles bound for Montreal were loaded on scows, one of the defendants objected to taking the ashes down to Montreal owing to the lateness of the season. But Stewart, one of the plaintiffs, urged their being sent, and assisted in the loading. While in the rapids and about a mile from Montreal, the scow was carried on to a rock and sunk. The evidence was contradictory as to whether the loss was occasioned by a sudden gust of wind, or by the fault of the pilot in not steering properly. The question was left to the jury, who found for the plaintiffs for the value of the ashes at Montreal, less the freight.

*Storrs*, for the defendants, moved for a new trial, contending that the loss having occurred beyond the jurisdiction of the state, the carriers' liability must be governed by the marine law which excuses for losses arising from perils of the sea: *Marshall on Insurance*, b. 1, c. 7, s. 4; *Forward v. Pittard*, 1 T. R. 27; *Hotham v. The East India Co.*, Doug. 178; *Bac. Abr.*, tit. Carriers, B. and note; 15 Vin. Ab. 844; *Master of Ships*, B. 12; *Molloy*, b. 2, c. 2, s. 2.

*Kirkland, contra*, insisted that the defendants were liable as common carriers for all losses except those occasioned by the acts of God or the public enemies: 1 Roll. Ab. 2-6; 4 Co. 84; 2 Ld. Raym. 918; 1 T. R. 27; *Jones on Bailment*, 103, 104; 5 T. R. 389; 1 Salk. 143; 6 Johns. 160 [5 Am. Dec. 200]; 1 Com. Dig., tit. Carriers, C. 1, 299; 3 Esp. 127. The distinction taken by counsel has not been made heretofore: 1 Wils. 282; 8 Johns. 213; 6 Id. 180 [5 Am. Dec. 206]; 3 Cai. 217.

KENT, C. J. The defendants move for a new trial on the following grounds: 1. Because the judge ruled that the contract placed the defendants in the character of common carriers; 2. Because he ruled that the testimony, as to what happened at Ogdensburgh, did not change their responsibility; 3. Because the verdict was against evidence.

1. The defendants, by their advertisement, undertook the carrying business, or the transportation of property for hire, from the ports of Lake Ontario to Montreal, by carrying the same in vessels from the ports of the lake to Ogdensburgh, and in scows and batteaux from thence to Montreal, and they promised to perform the same with fidelity and safety. In pursuance of this general undertaking, Captain Holmes, in the employment of the defendants, took the ashes on board of his sloop, and brought them to Ogdensburgh, where they were embarked on board of their boat, under the care of Captain Prosser, for Montreal; and all this was done with the knowledge and assent of the defendants. They were, therefore, common carriers, in the sense of the law, and liable to all the duties and responsibilities attached to that character.

It has long been settled that a common carrier warrants the safe delivery of goods, in all but the excepted cases of the act of God and public enemies; and there is no distinction between a carrier by land and a carrier by water. Masters and owners of vessels are liable, as common carriers, on the high seas as well as in port, and the argument of the ingenious counsel for the defendants is not well supported in the position, that this doctrine of common carriers is, by the common law of England, to be confined to cases of transportation by water within the jurisdiction of the realm, and that it does not apply to losses arising out of the state. All the books and all the cases which touch this subject lay down the rule generally, and apply it as well to shipments to or from a foreign port as to internal commerce. In the case of *Morse v. Slue*, T. Raym. 220; S. C., 1 Vent. 238, 290; 1 Mod. 85; 2 Lev. 69, the defendant was charged as a common carrier, under the custom of the realm, and that by the custom those who undertake to carry goods beyond sea, were bound to keep them safe, and that the goods in that case were delivered on board the ship, of which the defendant was master, to be transported for a reasonable reward to Cadiz, in Spain. Lord Holt, who was one of the counsel who argued the cause on the part of the plaintiff, said that the declaration was drawn by one of the best special pleaders of the time.

The judgment of the court in favor of the plaintiff was delivered by Sir Matthew Hale, who declared that the master was liable, in consequence of the reward which he or the owners received as freight, and that he was liable as a common carrier, for it was admitted that there was not the least negligence. Though the goods were lost by robbery on board the vessel in the river Thames, before the voyage had commenced, yet the court did not proceed on the ground that the master was responsible under one law in port and under another at sea. The court said the case was to be decided by the rules of the common law, and not of the admiralty law, and that there was no difference between this case and that of a common carrier. If the master be chargeable as a common carrier, for goods received to be transported beyond sea, it would seem to be very extraordinary and idle for the law to regard him in that character only from the time that the goods were received on board, until he had put to sea, and to regard him when coming from abroad as common carrier only from the time that he entered within the jurisdiction of the port. There is no color of such a limitation of the rule. The character, duty and responsibility of a carrier continue to attach to the master as long as he has charge of the goods. Molloy, who was counsel with Holt in the above cases, cites the above case, b. 2, c. 2, s. 2, to prove that by the common law the master is answerable; "if the goods be lost or purloined, or sustain any damage, hurt or loss, whether in the haven or port before, or upon the seas after she is on her voyage." If there be any exception as to this responsibility at sea, it proceeds from the special provision in the charter party, or bill of lading, and not from any suspension of the rule. The exception of the perils of the sea is not to be found in the forms of a charter party or bill of lading, as given by West under Elizabeth: West's Symb., part 1, s. 655, 656, 659; but we find it afterwards in the charter party in the time of Charles I.: *Pickering v. Barkley*, Sty. 132, and the exception has lately been extended to almost every kind of accident: Abbott, part 3, c. 2, s. 8. There is likewise a recent British statute, 26 Geo. III., restraining the general responsibility of ship-owners. These exceptions are strong evidence of the acknowledged law which rendered them necessary. In short, it must be regarded as a settled point in the English law, that masters and owners of vessels are liable in port, and at sea, and abroad to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter party or bill of lading,

or by statute: *Rich v. Kneeland*, Cro. Jac. 330; *Goff v. Clinkard*, 1 Wils. 282, note; *Smith v. Shepherd*, cited in 2 Com. on Cont. 323; *Buller v. Fisher*, 3 Esp. N. P. 67; *Bever v. Tomkinson*, East. T. Geo. III., cited in Abbott, part 3, c. 4, s. 4.

It would be of no avail if the counsel for the defendants could succeed in taking this case out of the operation of the custom of the realm, and placing it under the marine law. That law is essentially the same, and holds an equally strict control over the master, and upon the same principle of public policy, a master of a vessel or common carrier, by the almost universal law of nations, as well as by the common law of England, is chargeable for all losses not arising from inevitable accident. If, therefore, according to Roccus, a theft be committed on board, the master is answerable like an innkeeper, though the loss happen without his fault. So if the ship strike on a shoal, unless it be by the violence of winds or storms, he is liable, because he did not provide against an accident which a careful navigator would have foreseen. So he is liable if he does not conduct the voyage with a due regard to the circumstances of the ship, time and place, and the practice of skillful navigators: Roccus, n. 40, 55, 56; Emerigon, tom. 1, 373, 377, says it is so difficult to discover the faults of a master of a vessel that he is held responsible for very slight negligence. He is in fault if he has not foreseen what he ought to have foreseen with due diligence. In short, he says the master, in consequence of his compensation, is answerable for all damage which the cargo receives, unless it proceeds from an accident which he could not foresee or prevent. Valin declares expressly, tom. 2, 394, that nothing but the *cas fortuit* will excuse the master of a ship from responsibility for a loss. The rule applies, in the French code, equally to carriers by land and by water. We must therefore conclude that there is nothing peculiar on this subject in what is termed, in the English law, the custom of the realm; for the marine law lays down the rule against carriers with essentially the same strictness or severity of sanction.

The civil law, the source in this instance of the marine law, was equally guarded, and placed masters of vessels and innkeepers under the like responsibility. They were held liable, under an edict of the Prætor, for every loss happening without their fault, that did not happen *damno fatali*, or, as Voet expresses it in his commentaries, *excepto eo solo, quod damno fatali aut vi majore, veluti naufragio aut piratarum injuria, perisse con-*

*et al*; and he says that except as to the penalty, the rigor of the rule continues to this day in the Dutch jurisprudence: Dig. 4, 9, s. 1, 3; Dig. 47, 5, s. 1, 3; Voet's Commentaries, h. t. The reason given in the civil law for the rule is, that it was necessary to confide largely in the honesty of these people, and to give great opportunities to commit frauds which it would be impossible to trace. And this strict rule has no doubt been as generally adopted and as widely diffused as the Roman law. Erskine, Institutes, 452, pl. 28, 29, says that the edict of the Prætor is, with some variations adopted into the law of Scotland. Indeed, we find the rule stated in precisely the same terms, in the ancient usages of a country into which we do not know that the Roman law ever penetrated. "If a load be damaged by a carrier's fault, whatever is lost he shall be compelled to make good, unless the injury happened by the act of God, or of the king, and whatever does not so happen denotes a fault:" Colebrooke's Digest of Hindu Law, vol. 2, 372, 374.

The courts in this country have always considered masters of vessels liable as common carriers, in respect to foreign as well as internal voyages. In *McClures v. Hammond*, 1 Bay, 99 [1 Am. Dec. 598], the defendant undertook to bring a quantity of tobacco for the plaintiff from Augusta, in Georgia, to Charleston, and the vessel was driven ashore on the coast during the voyage; and as the loss did not appear to have arisen from inevitable accident, he was held liable as a common carrier. So in *Bell v. Reed*, 4 Binn. 127 [5 Am. Dec. 398], the defendants were considered liable as common carriers for goods lost on a voyage from Fort Erie, in Upper Canada, to Pennsylvania, though the loss happened on the Canadian shore. It was a conceded point that the common law doctrine applied to the case. The cases decided in this court of *Schieffelin v. Harvey*, 6 Johns. 170 [5 Am. Dec. 206], and of *Walkinson v. Laughton*, 8 Johns. 213, have proceeded upon the principle that the master of a ship is liable as a common carrier for an embezzlement happening in the course of a foreign voyage.

2. There was not any act done or new contract between the parties at Ogdensburgh, which prevented the application of this rule. The only circumstance that occurred there was a reluctance expressed by Captain Prosser to load the scow to the extent that the plaintiffs wished, and a reluctance in the defendant to carry ashes to Montreal at so late a time in the year. But still the undertaking went on without any new contract or

syn understanding whatever between the parties to vary or lessen the general nature or effect of the engagement.

3. The only real point in the case was a question of fact submitted to the jury, viz., whether the loss of the scow was to be attributed to that inevitable necessity not arising from the intervention of man, which human prudence could not have avoided, and which is considered in law as the act of God. There was contradictory testimony upon this point, but we think, with the judge who tried the cause, that the weight of evidence was in favor of the conclusion drawn by the jury, and that the loss did not arise from any sudden gust of wind, but from the want of due care and skill in steering the boat down a well known and dangerous rapid. The dangers of such a rapid were at the risk of the common carrier as much as the dangers of a broken and precipitous road. The loss must have arisen from some extraordinary occurrence as winds, storms, lightnings, etc., to bring the carrier within the exception.

By the whole court, motion denied.

See 2 Kent Com. 593, affirming the doctrine of the case.

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## JACKSON v. LAWTON.

[10 JOHNSON, 23.]

**FIRST PATENT ISSUED, PRIORITY OF.**—Where a patent had been issued, and afterwards a second, which recited a mistake in the issuing of the first, it was held that the first was conclusive as to the title until it was set aside by a proper proceeding instituted for that purpose.

**VALIDITY OF PATENT, HOW DETERMINED.**—If a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appear on the face of the patent itself, it is not void, but voidable only by a suit for that purpose.

**EJECTMENT.** The cause was submitted upon an agreed statement of facts: The plaintiff claimed under letters patent, dated October 28, 1811, and recorded February 4, 1812. The defendant claimed under a subsequent patent, dated March 5, 1812, which alleged a mistake in issuing the prior letters patent. Parol evidence, in support of the second patent, was objected to.

*Van Vechten*, for the plaintiff.

*Hale and Foot*, contra.

By Court, KENT, C. J. The patent granted to the lessor of the plaintiff, being the elder patent, is the highest evidence of

title. As long as it remains in force, it is conclusive as against a junior patent for the same lands. If the lands passed by the first patent, the second patent is without any operation and void. It has been the uniform practice in our courts, in all questions of title, to look to the elder patent, and to give it effect. Nor can the court take notice of any equitable claim upon the general government, which a third person might have had in respect to the lands in question prior to the issuing of the patent. We can only look to the title under the great seal, and so the law was declared in *Jackson v. Ingraham*, 4 Johns. 163. The elder patent must, therefore, be impeached and set aside, before we can acknowledge any title set up under the younger patent; and the question is, whether it can be impeached by parol proof in this suit.

Letters patent are matter of record; and the general rule is, that they can only be avoided in chancery by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name. This is the settled English course, sanctioned by numerous precedents, and we have no statute or precedent establishing a different course. The books frequently speak of the very case of two successive patents for the same thing; and they say the second patent is void, but they also say that the *scire facias* lies by the first patentee against the second patentee to avoid his patent, and the precedents are that way; this produces embarrassment and difficulty in the case, as it would seem from this that the last patent was, in the first instance, to be preferred: 6 Edw. IV. 9 b; Keilw. 196, b; 4 Inst. 88, Dyer, 197, b; *Hunt v. Coffin*, Dyer, 198, a; Jenk. Cent. 126, case 56; *The King v. Buller*, 3 Lev. 220. In the case of *Basset v. The Corporation of Torrington*, Dyer, 276, a, pl. 52, it was determined by the master of the rolls, with the aid of two justices, that the *scire facias* must be brought by the first patentee, and that it would not lie by the second patentee against the first, because "it was contrary to the books of precedents and the common course." But there was another reason also given for the judgment in that case, which was, that the patents were not of one and the same thing. This point is, however, by no means to be considered as settled, for in *The Duke of Norfolk's case*, Year Book, 39 Hen. VI. 32, b, it was said by Choke, that, if there be two patents of the same thing, the second grantee shall not oust the first grantee, without *scire facias* by the second, as the first patentee is in by matter of record; and this position was impliedly admitted in

the answer given by the court. The same thing was said by Judge Jenkins, Cent. 126; and it was assumed as a clear point by the counsel in the elaborate argument, in the case of *The King v. Amery*, 2 T.R. 515. In *Daniel's case*, Dyer, 133, b, the second patentee actually brought a *scire facias* to repeal the prior patent, and I think it would be difficult to assign a good reason why the second patentee should not have the writ. He is better entitled to the writ, because the first patent is the highest evidence of right, and stands good until it be overthrown; and the *onus* of the attack is thrown upon the younger patent.

The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. It was anciently held, Bro. Trav. Offi. pl. 52, that if the king entered without office or title, he who had the right could not enter upon the king, but was put to his petition. In addition to the remedy by *scire facias* which the younger patentee has in this case, there is another by bill in the equity side of the court of chancery. Such a bill was sustained in the case of *The Attorney-general v. Vernon*, 1 Ver. 277, 370, to set aside letters patent obtained by fraud, and they were set aside by a decree. In Maryland, the practice has been long settled to vacate patents by a decree in chancery, founded on a proceeding by bill, information, or *scire facias*: 1 H. & M. 23, 92, 165; 2 Id. 201, 244, and in one of the cases it was admitted by the chancellor, 2 H. & M. 141, that as long as a grant remained unrepealed by chancery, it must prevail at law against a younger grant.

If the elder patent in the present case was issued by mistake or upon false suggestions, it is voidable only, and unless letters patent are absolutely void on the face of them, or the issuing of them was without authority or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity or mistake is directly put in issue. The principle has been frequently admitted that the fraud must appear on the face of the patent, to render it void in a court of law; and that when the fraud, or other defect, arises on circumstances *dehors* the grant, the grant is voidable only by suit: 1 H. & M. 187, 190; 1 Munf. 134 [4 Am. Dec. 541]. The regular tribunal for this purpose is chancery, founded on a proceeding by *scire facias* or by bill or information. It would be against precedent and of dangerous consequences to titles to permit letters patent, which are solemn grants of record, to be impeached collaterally by parol proof in this action.

The evidence offered at the trial was inadmissible, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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The subject of this decision will be found examined in a note to *White v. Jones*, 2 Am. Dec. 564.

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## VAN ORDEN v. VAN ORDEN.

[10 JOHNSON, 30.]

**LIABILITY OF DEVISEES TO PAY LEGACY.**—A testator devised his real and personal estate to his two sons for life, giving his wife an annuity of fifty dollars during her widowhood, directing his said sons to pay such annuity so long as she should continue his widow, and which annuity was to be in lieu of dower. The devisees took possession of the estate, paid the widow on account of the legacy seventy-five dollars, and thereafter refused to pay her more. They were held liable to pay her the annuity, for the acceptance of the estate devised, and part payment was equivalent to an express promise to pay.

**DOWER BARRED BY ACCEPTANCE OF LEGACY.**—The acceptance of the legacy by the widow under the provision of the will was held to bar her dower in equity; and that the payment of part, and the recovery of judgment for the residue remaining due, would be a good plea in bar at law to an action for her dower, as it was conclusive evidence of an election.

**ASSUMPSIT for legacy.** The husband of the plaintiff died seised of certain real estate, which he devised to his sons, the defendants, for their lives. The defendants entered into possession under the will, which contained the following clause: "I give and bequeath to my beloved wife Sarah, for so long a time as she shall remain my widow, the sum of fifty dollars annually. It is my will and pleasure that my said sons, William and Ignatius, shall, in consideration of the bequest made to them, pay to my said wife Sarah, the said sum of fifty dollars, yearly and every year thereafter, and for so long a time as she shall remain my widow. It is, nevertheless, to be understood, that the said annuity is in lieu of dower." The plaintiff remained a widow, and has received on account of the legacy, from the defendants, seventy-five dollars. For the balance due this action was brought. The case was submitted without argument.

**By Court.** This case does not come entirely within that of *Beecker v. Beecker*, 7 Johns. 99 [5 Am. Dec. 246]; for here is no express promise to pay admitted, or stated to have been proved. But the question is whether here is not a circumstance equivalent to such a promise. The defendants are the original

devisees, and in consideration of the devise, they were expressly charged with the payment of the annuity to the plaintiff. They took possession of the land devised, and they have paid to the plaintiff the first and part of the second annuity. There is no excuse offered why they have discontinued the payment, and perhaps it is not going too far, and is within the spirit of the former decision, to consider the acceptance and enjoyment of the estate devised, and the actual payment of part of the annuity, as in this case, conclusive evidence of an express promise to pay, and so as to entitle the plaintiff to recover in this action. The court are inclined to go so far; but this decision will not apply to a suit against a devisee or terre-tenant who has not either expressly assumed to pay, or given such evidence of the promise.

In *Deeks v. Strutt*, 5 T. R. 690, there was no express promise to pay the legacy, though the executor had paid it for several years, and the court held that the suit would not lie. But the force and effect of such a payment, as evidence of an express promise, does not seem to have been considered by the court, and they went upon reasoning calculated equally to defeat the action, whether there was or was not an express promise. But it being now settled that an express promise by the devisee will support the action at law, we are led to consider whether the payment of the annuity in part be not equivalent to the express promise. It is a solemn act and admission, as strong as any promise, and supposes a promise expressly made and to have preceded the payment. After the annuity has been regularly paid for several years, as it was in the case of *Deeks v. Strutt*, it seems unreasonable to consider the party as not bound at law to continue to pay, unless you can prove that at some one time he had made an express promise to pay, and then to hold him bound. His payment is the best evidence of such a promise, for it is one partly performed.

Another difficulty has presented itself in this case, and that is, whether the plaintiff, by the acceptance of the annuity already paid, has barred herself of her claim-dower. As the annuity was expressly given in lieu of dower, the acceptance of the annuity would no doubt constitute an equitable bar; but unless she has also legally barred herself, it would be improper for a court of law to allow her to recover both her annuity and her dower. We are inclined to think, however, that a judgment in her favor in this suit, and especially in connection with the payment already accepted, would be a good plea in

bar of her dower, as being conclusive evidence of an agreement and election to accept of the testamentary provision, in lieu of dower. In 3 Leon. 373, it seemed to be admitted that if the wife accepted of a jointure made after marriage by entry upon the land, it would constitute a legal bar of dower, and that her election would bind her at law. In *Gosling v. Warburton*, Cro. Eliz. 128, a recovery in dower was held, at law, a bar to a suit for a testamentary provision made for her in lieu of dower. These cases cited by Lord Redesdale, 2 Sch. & Lef. 450, to show that courts of law, as well as courts of equity, will hold the wife to her election; and that whenever she has by her acts declared that election, and proceeded upon it, she shall be deemed to have put an end to the counter-claim. He says, and we all know that he is deservedly considered as a most eminent authority, that there is no difference in principle in the decisions of the courts of law and equity on this subject, and that the difficulty of reaching the justice of the case has frequently thrown these questions into courts of equity.

Judgment for the plaintiff.

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### AMORY v. FLYN.

[10 JOHNSON, 102.]

**PROPERTY IN WILD ANIMALS.**—An action of trover will lie for wild geese which have been tamed and strayed away, but without regaining their natural liberty.

**REWARD TO FINDER.**—A person finding the property of another has no right to a reward from the owner; he is only entitled to be paid his necessary expenses in its preservation.

**CERTIORARI** from a justice's court. Verdict and judgment had been given for the defendant Flyn, in an action of trover brought against him by Amory, for two geese. Plaintiff proved a demand of the geese, a refusal by the defendant, unless the plaintiff would first pay twenty-five cents for liquor furnished to two men who had caught the geese and pledged them to defendant for it. The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed twice before and did not return until brought back. The plaintiff proved property in them; and that after the geese had left his premises, the son of the defendant was seen pursuing them with dogs, and was informed that they belonged to the plaintiff.

By COURT. The geese ought to have been considered as re-

claimed, so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no color for the inference that the geese had regained their natural liberty as wild fowl, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the lien, which he supposed he had acquired by the pledge. This claim was not well founded; for he showed no right in the persons who pawned them for the liquor, so to pawn them, and he took them at his peril. Here was clearly an invasion of private right. If the person who took the geese, or who had kept them, had been put to necessary expense in securing them, such expense ought to have been refunded; but no such expense was shown or pretended, and to sanction such a pawn as this, would lead to abuse and fraud.

A person who takes up an estray cannot levy a tax upon it, but by way of amends or indemnity. This is the doctrine of the common law: 1 Roll. Ab. 879, c. 5; Noy, 144; Salk. 686; and the Roman lawyers equally denied to the finder of any lost property a reward for finding it. *Non probe petat aliquid*, says the digest: Dig. 47, 2; 43, 9. And, indeed, the civil law, Id. s. 4, considered it as theft to convert to one's use, *animo lucrandi*, property found without endeavors to find the owners, or without intention to restore it. But theft was not always considered in that law in the very odious sense of our common law, for as to the class of thefts denominated thefts not manifest, and of which this was one, that law provided only a civil remedy of double damages: A. Gellius, Noct. Alt. lib. 11, c. 18, who cites the very passage in the civil law, which declares such conduct theft, gives that appellation to many acts which our law does, and ought to regard as trespasses merely; such, for instance, as ouster of possession of land. But taking the civil law in the milder sense, it sufficiently shows what was considered in the wisdom of the ancients as right and duty in this case. The practice of mankind is apt to be too lax on this subject, and when occasion offers, courts ought to lay down and enforce the just and benevolent lesson of morality and law.

The verdict in this case being against law and evidence, cannot be supported.

Judgment reversed. •

This case is cited and relied on in *Sheldon v. Sherman*, 42 N. Y. 489, as laying down the doctrine that the party who takes care of another's property pledged, is entitled to have his expenses paid. On this point its authority is recognized in *Chase v. Corcoran*, 106 Mass. 288.

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## NICKLESON v. STRYKER.

[10 JOHNSON, 115.]

**NECESSITY OF SERVICE.**—An action for seduction cannot be maintained by a father, where his daughter is above the age of twenty-one years, unless she is actually in his service.

**TRESPASS** for assaulting and debauching plaintiff's daughter. It appeared that the daughter was twenty-nine years of age, and working out at the time of the connection with defendant; that the father did not claim her wages, but that they were from time to time applied to pay for necessities for the family. The child was born at the father's house, who also had the expense of her lying-in.

A verdict was taken for the plaintiff subject to the opinion of this court.

*N. Williams*, for the plaintiff, contended that though the daughter was above twenty-one years of age, yet if she had not abandoned her father's house, the supposed relationship of master and servant still subsisted, so as to support the action: 3 Wils. 18; 2 T. R. 4166; *Peake's Cas.* 55, 233; 3 Burr. 1878; 5 East, 45; 5 Bos. & P. 482; 8 Esp. 119; 3 Selw. N. P. 969.

*Foot, contra.*

By COURT. As the daughter in this case was twenty-nine years of age, and not in the actual service of her father when she had the connection with the defendant, the plaintiff cannot sustain the action. The rule is settled, that if the daughter be of age, she must be in her father's service so as to constitute in law, and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her. If she be under age, she is presumed to be under his control and protection, so as to entitle him to the action, whether she actually resides with him or not; and this was the decision of the court, at the last August term, in *Martin v. Payne*, 9 Johns. 387 [*ante*, 288], in which the authorities were reviewed, and this plain distinction taken and adopted.

Judgment for the defendant.

## JACKSON v. STANLEY.

[10 JOHNSON, 133.]

**PRIVATE STATUTE DIVESTING TITLE.**—Where a patent for a military lot was granted to David H. without words of description, and it was claimed by the heirs of Daniel H., a private statute confirming the title to the heirs of Daniel H., though inoperative to divest the title was held valid as confirmatory of a void grant, it being shown by parol that Daniel H. was intended as the original patentee.

**EJECTMENT.** The lessors of the plaintiff were the heirs of Daniel Hungerford. The defendant claimed under the heir of David Hungerford. The plaintiff produced a patent for the premises, issued to David Hungerford, registered as a soldier in McKean's company, and offered various testimony to prove that there was no such person in that company as David H., but that there was a soldier of the name of Daniel H. Plaintiff also produced an act of the legislature, reciting that a patent for the lot in question having issued in the name of David H., which should have been in the name of Daniel H., it was enacted that the "letters patent shall be deemed to have vested the said lot in the said Daniel H., in the same manner as if such letters patent had been issued in the name of said Daniel." Defendant's counsel objected to this act as evidence on the ground that the legislature was incompetent to divest vested rights; the point was reserved. There was in evidence a certified copy of an extract from the balloting-book kept by the commissioners of the land-office, which showed the entry to be in the name of David H. The defendant proved that a David Hungerford had enlisted in the army during the revolutionary war, and served until its close, but did not show in what company he had served.

Verdict for the plaintiff.

*Sil*, for the defendant.

*Seely*, *contra*.

By Court, KENT, C. J. The patent which issued in the name of David Hungerford, was undoubtedly intended for the soldier by the name of Hungerford (then dead), who belonged to McKean's company in the first New York regiment. This intention is manifest from the balloting-book in the secretary's office, and from the premises being a military lot, and part of the lands set apart by law for the two regiments belonging to this state, and from the further fact that by the provision in the act of the

sixth of April, 1790, the lots were to be balloted for, and the patents to issue in pursuance thereof, and in the name of the original soldier. If Daniel Hungerford was the soldier who belonged to that company and regiment, and no person of the name of David Hungerford was a soldier in that regiment, there must have been a misnomer in the christian name of the patentee. I think the evidence taken at the trial establishes the mistake; and the question is, whether that evidence was admissible, and if so, what the legal effect of it? Here is no ambiguity in the face of the patent, but it is a latent ambiguity, and according to the general rule the parties may go into extrinsic evidence to ascertain the grantee, and clear up the mistake in the soldier's name. Parol evidence has been admitted in the case of a will, to ascertain the person, when two were of the same name, or when there had been a mistake of the christian name of the devisee: *Cheyney's case*, 5 Co. 68; *Ulrich v. Litchfield*, 2 Atk. 373; *Parsons v. Parsons*, 1 Ves., jun. 266; *Thomas v. Thomas*, 6 T. R. 671. But with respect to deeds and grants, the old general rule seems to have been, that an omission or mistake of the christian name of the grantee rendered the grant void. This was the opinion of the judges in the case of *Humble v. Glover*, Cro. Eliz. 328; and it is stated by Lord Bacon, (Maxims, 107), that if one grant land to I. S., son and heir of G. S., and it be true that he is son and heir of G. S., but his name is Thomas, it is a void grant. Lord Coke, however, holds, Co. Lit. 3 a., that a grant may sometimes be good, though the grantee's name of baptism be mistaken. Thus, if lands be given to Robert, Earl of Pembroke, when his name is Henry, or to George, Bishop of Norwich, when his name is John, the grant is still good, because there can be but one of that name of dignity. If, then, the patent in this case had designated the Hungerford intended, by specifying the regiment and company to which he belonged, at the time of his death, it might have been good, as being equally susceptible of being reduced to certainty. But the patent adds no description, or demonstration to the name of the patentee. It is simply a patent of the lot to David Hungerford, and according to the rule which has been mentioned, the heirs of Daniel Hungerford cannot take under that patent, because their ancestor is not the patentee named. In all the cases which I have seen where there was a misnomer, there was some description connected with the name, and there was no other person who set up a title in competition under the erroneous name; but here the defendant claims under one David

Hungerford, and contends that he was the grantee, and a soldier in the line of this state, though the proof of the fact is extremely weak, and no proof was offered that he was a soldier in McKean's company, in the first regiment, or that he belonged to either of the two regiments of infantry, for the use of whom the military bounty lands were appropriated. The verdict is to be considered as establishing the fact that Daniel was the soldier who served, and must have been the soldier intended.

The grant, then, is either void by reason of the misnomer, or the parol proof supplies and corrects the mistake in the christian name of the soldier intended, and in either case, the lessors of the plaintiff are entitled to recover. We do not go upon the ground that the act of the legislature could divest a right legally acquired under the patent. It could not. But the title gave no title to the person under whom the defendant holds, because he was not the patentee. The ancestor of the lessor of the plaintiff is shown by the proof, and found by the verdict, to be the patentee intended; and if the mistake in his christian name rendered the patent void, the title to the lot remained in the state until the act of the legislature, which is to be considered in the light of a legislative grant, and supplying the place of a patent in the ordinary form. The competency of the legislature to alienate their lands, by statute, is not to be questioned.

2. The defendant does not come within the act of the fifth of April, 1803, sess. 26, c. 88, entitling, in certain cases, the tenant in possession of the military lands to payment for his improvements. The defendant is a lessee under Stanly, who entered upon the lot claiming it in right of his wife, who was the heir of one David Hungerford. Here was no entry and settlement under color of purchase, but under color of title by descent.

The motion for a new trial is accordingly denied.

Motion denied.

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## JACKSON v. BULL.

[10 JOHNSON, 148.]

**WHEN CHARGE IN DEVISE CREATES A FEE.**—Where, in a devise, the payment of the testator's debts is charged upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee. Accordingly, where a father devised certain real estate to his two sons, to be equally divided between them, and added, "the debts to be paid out of my estate that I shall die seised of," it was held that the sons took an estate for life only.

**EXECUTMENT.** The case is stated in the opinion. Verdict for the plaintiff.

*J. Tallmadge, jun.*, for the plaintiff.

*Oakley, contra.*

By Court, KENT, C. J. The lessors of the plaintiff claim as heirs at law of Joshua Hamlin, deceased, and the only question in the case is whether his sons Joshua and Ephraim, under whom the defendants hold, took, by virtue of his will, an estate in fee or for life. The testator gave to his son David the farm he (David) then lived on, and he gave to his two sons, Joshua and Ephraim, the farm he, the testator, lived on, to be equally divided between them, and adds: "The debts to be paid out of my estate that I shall die seised of." As there are no apt words of limitation, the two sons took only an estate for life, unless a fee is to be inferred by implication, by reason of the charge of the debts upon the estate.

The distinction which runs through the cases is that where the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life, but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee, on the principle that he might otherwise be a loser: *Goodtitle v. Maddern*, 4 East, 496; *Doe v. Snelling*, 5 Id. 87; *Moore v. Denn*, 2 Bos. & P. 247; *Doe v. Clarke*, 5 Id. 343; *Colyer's case*, 6 Co. 16. When the charge is on the person, the devisee takes the estate on condition of paying the charge, and if he die in the life-time of the testator, the charge ceases; and if he refuse to accept and perform, the devise is void, and the heir may enter. In this case, the will merely created the charge upon the estate. There was no personal charge upon the devisees, and consequently the case is not within the reason of the rule for enlarging the estate into a fee, by reason of a charge. It may admit of some dispute what words will amount to a charge on the person, so as to render the devisee who accepts of the land, personally, and at all events, liable for the debt or legacy charged, and the cases on this point are not altogether consistent. In *Dickens v. Marshall*, Cro. Eliz. 330, A. devised all his lands and goods, after his debts and legacies paid; and in *Denn v. Miller*, 5 T. R. 558, the devise was of all lands and goods, after payment of his just debts, etc., and it was held in both cases that the devisee took only an estate for life; and though the latter decision was reversed in the exchequer chamber, 2 Anst. 721 1 Bos. & P 558,

it was not upon the point of the nature and effect of the charge. In *Doe v. Allen*, 8 T. R. 497, the devise was that after the debts being first paid out of the personal, and if not sufficient, out of the real estate, he devised, etc., and the devisee was held to take only an estate for life. So in *Redoubt v. Redoubt*, 8 Vin. 217, pl. 18, the devise was that five hundred pounds be paid as soon as may be out of the aforesaid estate and premises; and in *Doe v. Clarke*, 5 Bos. & P. 343, the words were, I charge all my estate, both real and personal, with the payment of the above legacies, and yet in neither case did the devisee take a fee for want of apt words of inheritance.

These are instances of a charge upon the land and not upon the person. But the following cases might be cited to illustrate the other part of the rule. As in *Colyer's case*, 6 Co. 16, the devise was to A., he paying, etc.; and in *Doe v. Holmes*, 8 T. R. 1, the words were, I give my house and furniture to A., she paying, etc.; and in *Goodtill v. Maddern*, 4 East, 496, the devise was of all the rest, etc., of lands, goods and chattels, etc., to my executrix, etc., so that she pay, etc., and they were all held to be charges on the person, so as to carry a fee by reason of the charge. There are other cases of this kind which have been held to carry a fee, though the words were not so strong. Thus, in *Philips v. Hele*, 1 Rep. in Ch. 101, the words were, all the rest of my goods and lands I give to A. to discharge all things charged in my will; and in *Doe v. Richardson*, 3 T. R. 356, the devise was of all the lands, etc., his legacies and funeral expenses being thereout paid; and in *Doe v. Snelling*, 5 East, 87, the devise was of lands and goods, after having thereout first paid debts and legacies, and in all these cases the devisee was held to take a fee.

It will be in vain, as must appear from this imperfect sketch of a few leading cases, to look for uniformity and harmony of decision in this branch of the law. The opinion of the court of C. B. in *Doe v. Clarke*, 5 Bos. & P. 343, very justly questions the application of the general principle in the two last cases above referred to, since the charge appeared very evidently to be upon the estate, and not personally upon the devisee. Cases may frequently mislead us by their misapplication of principle, but it is our duty always to endeavor to recall and adhere to the principle, in opposition to any particular case. The reasoning of Sir James Mansfield is the most plain and logical of any in the modern cases on this point; and the case of *Doe v. Clarke* is the most recent, and perhaps the most sound authority, and it

is decisive to show that the charge in the present case was upon the land, and not upon the person of the devisees, and that they took only an estate for life. That case, as well as the case of *Redoubt v. Redoubt*, is in point on another ground, and shows that the devisees here took only for life. Sir J. Mansfield says, there is no case which has decided that a general charge upon the whole estate will give a fee to the devisee of only a particular part of that estate. In *Redoubt v. Redoubt* and in *Doe v. Clarke*, the charge was general, and the devise in question only a particular part of the estate, and the charge was held not to enlarge the estate to a fee. In the present case also, the charge is upon the whole estate generally, and not specifically upon the farm devised to the two sons, under who the defendants held.

The case of *Jackson v. Harris*, 8 Johns. 141, is also in point. The charge there was general, and the devise to Henry Harris of a particular lot. The charge there was also on the estate, and not on the person, and the decision was undoubtedly correct upon the principles above laid down, though perhaps that decision would have rested better upon one or the other of those grounds, for either is sufficient, than upon the principle which was there assumed.

The lessors of the plaintiff are accordingly entitled to recover the proportion stated in the verdict.

Judgment for the plaintiff.

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## HIGHLAND TURNPIKE COMPANY v. MCKEAN.

[10 JOHNSON, 154.]

**CORPORATION BOOKS AS EVIDENCE.**—The general rule is that corporation books are evidence of the proceedings of the corporation; but then it must appear that they are the corporation books, and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence. It is not sufficient that the books are in the handwriting of one who appears from the entries therein, and in no other way, to have been the secretary.

ACTION on the case to recover the amount subscribed by defendant in The Highland Turnpike Company. To prove the proceedings under the act establishing the corporation, and the averments of the declaration alleging the advertisement of notice of election of directors, the commencement of operations on the road, etc., the plaintiffs offered a book of minutes purport-

ing to be the minutes of the company, and called a witness to testify that they were in the handwriting of Howland, therein named as secretary. This evidence was objected to, but admitted, and, pursuant to the direction of the judge, a verdict was returned for the plaintiffs. Motion in arrest of judgment and for a new trial.

*J. Tallmadge, jun.*, for the defendant, cited 1 Str. 93; 3 Johns. 226; 8 Id. 212, 378; Bull. N. P. 282.

*Oakley, contra.*

By Court. The motion for a new trial and a motion in arrest of judgment were tried together; but as the court are in favor of the first motion, it is unnecessary, at present, to express an opinion upon the second.

The plaintiffs were bound to prove, upon the trial, the averments in their declaration; and if the book of minutes which was introduced had been legally authenticated, it would have contained the requisite proof of those averments. The general rule is, and it is a rule of evidence essential to public convenience, that corporation books are evidence of the proceedings of the corporation; but then it must appear that they are the corporation books, and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence: *King v. Mothersell*, 1 Str. 93; 12 Vin. tit. Ev. 90, pl. 16; 2 Camp. N. P. 101. In this case there was no legal evidence of the authenticity of the book, as being the minutes of the company, or that it had been regularly kept as such by the proper officer. The whole evidence consisted of the fact that the book was in the handwriting of one Howland, who appeared from the entries in the book (but in no other way) to have been secretary to the board. Unless, then, the book be considered as proving itself, there was no proof of its being the book it purported to be.

The motion for a new trial is accordingly granted, with costs to abide the event of the suit.

New trial granted.

## DEWITT v. YATES.

[10 JOHNSON, 156.]

**CUMULATIVE LEGACY, WHAT.**—Where the same sum of money is given twice to the same legatee, in the same writing, he can take only one of the sums bequeathed; the latter sum is presumed to be a substitution of the former, and it is incumbent on the legatee to rebut this presumption and show a contrary intention. But where the two bequests are in different instruments, as by will in the one case and by a codicil in the other, the presumption is in favor of the legatee's taking both sums.

**EVIDENCE OF TESTATOR'S INTENTION.**—The presumption in either case, whether against the cumulation, because the legacy is repeated in the same instrument, or in favor of it, because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence and the circumstances of the case.

**ACTION of debt for a legacy.** A verdict was taken for the plaintiff, subject to the opinion of this court, from which the case appears.

*Huntington*, for the plaintiffs.

*Skinner*, *contra*.

By Court, KENT, C. J. This is the case of a sum of money given twice in the same instrument to the same legatee. The general rule on this subject, from a review of the numerous cases, appears evidently to be, that where the sum is repeated in the same writing, the legatee can only take one of the sums bequeathed. The latter sum is held to be substitution, and they are not taken cumulatively unless there be some evident intention that they should be so considered, and it lays with the legatee to show that intention and rebut the contrary presumption. But where the two bequests are in different instruments, as by will in the one case and by a codicil in the other, the presumption is in favor of the legatee, and the burden of contesting that presumption is cast upon the executor. The presumption either, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it, because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence and the circumstances of the case: *Godolphin's Orphan Legacy*, part 3, c. 26, s. 46; *Swinb.*, part 7, c. 21, s. 13; *Duke of St Albans v. Beauclerk*, 2 Atk. 636; *Garth v. Meyrick*, 1 Bro. 30; *Ridges v. Morrison*, Id. 389; *Hooley v. Hatton*, Id. 390, n; *Wallop v. Hewell*, 2 Ch. R. 37; *Newport v. Kinsaston*, Id. 58; *James v. Semmens*, 2 H. Bl. 314; *Allen v. Callen*, 3 Ves., jun. 289; *Barclay v. Wainwright*, Id. 462; *Osborne v. Duke of Leeds*, 5 Ves. 309.

This question, which appears to have arisen so often, and to have been so learnedly and ably discussed in the English courts, was equally familiar to the civil law. The same rule existed there, and subject to the same control: Dig. 30, 31, 34; Id. 22, 3, 12, and the notes of Gothofrede, *ibid.* Voet, Com. ad Pand. tom. 2, 408, s. 34. And Chancellor D'Aguesseau, in his pleadings in the case of *The Heirs of Vaugermain*, Oeuvres, tom. 2, 21, adopts and applies the same rule to a case arising under the French law. The civil law puts the case altogether upon the point of the testator's intention; but then if the legacy was repeated in the same instrument, it required the highest and strongest proof to accumulate it. *Evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse.*

In the present case, what are the intrinsic circumstances to show a manifest intent of the testator to multiply the legacy? The only material variation in the two bequests is, that in the latter instance the legacy was charged upon Philip Vanderbergh in respect to the real estate to him devised. But this affords no evidence of an intention to accumulate. The inference is the other way. It was only strengthening the security of the legacy by means of the charge. There was no specified object; there was no assigned reason or cause, as respected the legacies, for repeating the bequest.

Courts have required some new or additional cause for enlarging the bounty, before they have held it accumulative, unless the words of the will clearly showed the intent. In a will the testator gave double legacies to his debtors, but he added, in those cases, that they were "in addition" to what he had before given; and the master of the rolls, in *Barclay v. Wainwright*, said that he laid considerable stress upon this, that where the testator meant addition he expressed it. The whole will denotes throughout a careful and studied apportionment of the testator's estate among his children, according to his opinion of their wants and circumstances; and he imposed several trusts and charges, probably with a view to greater accuracy in the partition of his estate. He appoints four sons executors, but he charges his funeral expenses upon three, and his debts upon two of them. A small variation in the direction as to payment will not alter the construction. In *Halford v. Wood*, 4 Ves. 76, the legacy was an annuity of thirty pounds for life, and in the one instance it was declared to be payable quarterly, and in the other instance the will was silent as to the payment, and yet was not held accumulative. So also in *Greenwood v. Greenwood*,

1 Bro. 31, n., the one legacy was simply to Mary Cook, "for her own use and disposing, notwithstanding her coverture;" and yet Lord Bathurst decreed that she was entitled to one legacy only.

As, then, the substituted legacy, in this case, has been paid by the devisee on whom it was charged, the defendant is entitled to judgment.

Judgment for the defendant.

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### JACKSON v. HENRY.

[10 JOHNSON, 185.]

**WHO AFFECTED BY USURY.**—A *bona fide* purchaser, without notice, under a sale made by virtue of a power of attorney contained in a mortgage is not affected by usury in the original contract.

**USURY, BETWEEN ORIGINAL PARTIES.**—Though the statute against usury declares the usurious contract and security utterly void, yet this is only between the original parties on the instrument infected with usury. Where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defense of usury cannot be set up against such innocent purchaser.

**EJECTMENT.** The plaintiff's lessors were the heirs at law of Daniel Miles. The defendant gave in evidence a mortgage of the premises in question from Miles and his wife to one McGourck. In this mortgage was a clause empowering the mortgagee, his heirs, executors, administrators or assigns, to sell the premises at public auction, in case the principal or interest should be unpaid. McGourck died, and by will devised the mortgage to his wife Sarah, and made her sole executrix. She, for a valuable consideration, assigned the mortgage to the defendant, who advertised the premises for sale at public auction, the principal and interest being due and unpaid. The premises were accordingly sold at public auction to R. Henry, who reconveyed the same to defendant a month afterwards for the consideration of one dollar.

The counsel for the plaintiff then offered to prove that the mortgage was given for a loan on which usurious interest had been reserved. This evidence was objected to as not affecting defendant's title, but was admitted. The jury found for the plaintiff, and the defendant excepted.

*Van Vechten and Hoffman*, for the defendant, contended that the sale was a species of foreclosure by law: *Bergen v. Bennett*,

1 Cai. Cas. 1 [2 Am. Dec. 281]; that the defendant was a *bona fide* purchaser, and not effected by the usury in the mortgage; that the usury should have been pleaded to avoid a specialty: Cro. Eliz. 588, 104; 2 Str. 1043; 1 Id. 498; 2 Ves. 147; 1 Atk. 345; 3 Lutw. 464: that the lessors of the plaintiff knew of the usury, and cannot now take advantage of it, their failing to disclose the same being fraudulent: 2 Johns. 589; 1 Eq. Cas, Ab. 356, pl. 10; 1 Ch. Cas. 128; *Hobbs v. Norton*, 9 Mod. 85, 88.

*Cady*, for the plaintiff, cited the statute of usury, sess. 24, c. 146, and urged that the mortgage was absolutely void, so that no estate could pass: Ord on Usury, 90; 1 Lev. 307. The defendant can only be considered as an assignee, and in that character he cannot support the mortgage: Pow. on Mort. 285; 6 Johns. 81; 8 Id. 144. In ejectment it is not necessary to plead the usury, it may be shown on the trial: 1 Esp. 11.

By Court, KENT, C. J. The material and important question presented by the bill of exceptions is, whether a *bona fide* purchaser without notice, under a sale duly made according to the statute, by virtue of a power contained in a mortgage, can protect himself against the allegation of usury in the debt for which the bond and mortgage were given.

The statute, sess. 24, c. 146, authorizes and regulates the sale under such a power; and requires it to be at public auction on six months' notice, and declares that it "shall not be defeated to the prejudice of any *bona fide* purchaser thereof in favor, or for the benefit, of any person claiming the equity of redemption." The statute accordingly renders such a sale equivalent to a foreclosure and sale under a decree in chancery; and it would be against the policy and principles of law, as well as the plain language of the statute, to allow the sale in this case to be defeated. It is true that the statute of usury, sess. 10, c. 93, declares all "bonds, bills, notes, contracts and assurances," infected with usury "utterly void;" and so are the adjudged cases, where the suit at law is between the original parties, or upon the very instrument infected. But when the contract has been changed by a new contract founded upon it, in which an innocent person was a party, the usury has not been permitted to be set up. Thus in the case of *Cuthbert v. Hales*, 8 T. R. 390, where A. made an usurious note to B., who transferred it to C. for a valuable consideration, without notice of the usury, and A., thereupon gave a bond to C. for the amount, the bond was held not to be affected by the usury. And Lord Kenyon

## CUNNINGHAM v. MORRELL.

[10 JOHNSON, 208.]

**RECOVERY ON DEPENDENT COVENANTS.**—It was agreed between defendant and plaintiff that defendant should pay plaintiff for completing the whole of certain work, a specified sum to be paid on or before a day fixed, in installments as the work progressed; these covenants were held to be dependent, and plaintiff not entitled to recover the whole, without full performance, nor any proportion without a ratable performance.

**MOTION** to set aside the referees' report in an action of covenant. Articles of agreement were entered into between the plaintiffs and defendant relative to the construction of a turnpike road. The material covenant was as follows: "The party of the first part agrees to pay to the party of the second part, for completing the whole of the aforesaid enumerated articles of covenant and agreement, the sum of six thousand dollars, to be paid on or before the twentieth October, 1810, in installments as the work progresses, in cash and stock of the company," in a certain manner. The referees were of opinion that the plaintiffs were entitled to recover only in proportion to the work actually done, and as they did not show the completion of the whole work, a report was made in favor of the defendant.

*Duer*, for the plaintiffs, relied upon *Sears v. Fowler*, 2 Johns. 272, and *Havens v. Bush*, Id. 387.

*Fisk*, *contra*, cited 1 Saund. 319, n. 3; 12 Mod. 455; 1 Ld. Raym. 662; Year Books, 48 Edw. III., 2, 3.

By Court, ~~KENT~~, C. J. We cannot distinguish this case, so as to take it out of the operation of the cases of *Sears v. Fowler*, and *Havens v. Bush*, 2 Johns. 272, 287. Those cases were governed by the English decision, in *Terry v. Duntze*, 2 H. Bl. 389; but from a more full consideration of the subject, we are now led to believe that the court of C. B. carried too far the principle of mutual and independent covenants. It is true that if by the terms of the contract the money is to be paid by a day certain, and which is to happen before the performance of the service, or by a day certain, and there is no day certain for the performance, the performance is not a condition precedent; and the party may sue for the money, without averring or showing performance. This is what was said by Lord Holt, in the case of *Thorp v. Thorp*, 12 Mod. 455; 1 Ld. Raym. 662; and he went no further with the doctrine of mutual covenants. Where

it would be repugnant to the contract to make the service a condition precedent, the parties, he observes, are left to mutual remedies, on which, by the express words of the agreement, they have depended. The cases which he cites of *Pool v. Tblcelser*, 48 Edw. III., 2, 3, and *Pordage v. Cole*, 1 Saund. 319, are to this effect; and in both of them the entire consideration was to be paid by a fixed time, and which might precede the service. Lord Holt further said in that case, "what is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed as he makes it. If he makes a bargain and relies on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A. shall have the horse of B., and A. agrees that B. shall have his money, they may make it so; and there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must then be averred."

After this rational explanation of the rule, we cannot but think it was misapplied, or carried to an unreasonable length, in *Terry v. Duntze*. The covenant in that case was, that the plaintiff should finish the building by a given day, and the defendant was to pay the consideration by installments as the building should proceed, and according to a certain and specified state of advancement, and the remaining part of the consideration when the building should be completed. But because two several sums of money were to be paid before the whole was performed, and when only a part of the service was performed, the court held the covenants independent, and as we understand the case, and as the reporter understood it, that the plaintiff might maintain his action for the entire consideration, without any averment of performance. This was contrary to the plain understanding of the parties, and was not warranted by any of the cases referred to. It was sufficient for the plaintiff to have shown the advance of the building as stipulated, to have entitled him to the installment then to be paid; but to entitle him to the last installment, he was bound to aver and show a completion of the contract. The good sense and justice of the case, as it appears to us, required this construction, and the meaning of the parties could not have been mistaken.

The error in that case, and in the two cases in this court which followed it, consisted in holding the covenants to be independ-

ent throughout, because a part of the consideration money was to be paid before the entire service was to be performed. This might have been the case if the contract in all those cases had not provided that a certain part of the consideration was to be paid on the completion of the service, and which rendered the service, *pro tanto*, a condition precedent. There is nothing unreasonable nor unusual in such an agreement. It has been the constant language of the English courts, that the dependence or independence of covenants depended on the good sense and meaning of the contract. "Their precedency," said Lord Mansfield, "must depend on the order of time in which the intent of the transaction requires their performance." A mechanic generally stands in need of advances from time to time, in aiding him to procure materials to carry on his work, and the employer, if prudent, will generally reserve a considerable payment until the work be completed, and to depend on such completion. But if all these payments can be demanded without performance, merely because a part of them were to be made as the work advanced, it would be making the intention of the parties subservient of technical rules. The parties have an undoubted right, if they please, to make their covenants dependent or independent throughout, or to make the covenants independent as to one payment, and dependent as to another. They have a right to mould their contracts so as to suit their mutual convenience and interests, and when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful.

For these reasons, I apprehend that we have yielded with too much deference to the decision in *Terry v. Duntze*, and did not sufficiently advert to the evil consequences of the doctrine in the extent there laid down. It becomes, then, our duty to limit the operation of that case, and of the two cases in this court which were founded upon it, so as better to fulfill the intention of the contract and the justice of the case; and in doing this, we may be permitted to consider it as some apology for those decisions that we at the time reposed upon the authority of so respectable a tribunal as the C. B., and especially when its decision was supported by so distinguished a judge as Buller, who was equally eminent for a clear and sound judgment, and for diligent and profound inquiry.

Having thus freed ourselves from undue embarrassment in considering the real merits of this case, we say that as the road was to be completed on or before the twentieth of October,

1810, and as the defendant was to pay therefor the sum of six thousand dollars, to be paid on or before that day, in installments as the work progressed, the just construction of the contract is, that if the plaintiffs will go for the whole consideration-money, they are bound to aver and show a performance of the whole work, and if they go for a ratable part of the money, they are bound to show a ratable performance. The decision of the referees was accordingly correct, and the motion to set aside their report ought to be denied.

Motion denied.

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### KELLOGG v. GILBERT.

[10 JOHNSON, 220.]

**ESCAPE—WHAT IS.**—A sheriff who, knowing that the judgment is unsatisfied, permits the defendant to go at large by the direction of the plaintiff's attorney, acting merely under his general authority, is liable for an escape.

**ATTORNEY'S POWER TO DISCHARGE DEFENDANT.**—An attorney cannot make a valid discharge of a defendant in custody on a *ca. sa.*, without the plaintiff's consent, or without satisfaction received either by the plaintiff or by the attorney.

**ACTION against a sheriff for an escape.** It appeared that the defendant had arrested one Clark on a *ca. sa.* in favor of plaintiff, and that Clark afterwards escaped without having satisfied the judgment. The defendant offered to prove that plaintiff's attorney directed the deputy sheriff to allow Clark to go out of his custody to procure a settlement from one Wells, which Clark agreed to apply to the satisfaction of the judgment in plaintiff's favor; and that Clark never returned into custody. The evidence was rejected and a verdict found for the plaintiff.

*Sherwood*, for the plaintiff, moved for a new trial.

*Seeley*, *contra*.

By Court, **KENT**, C. J. In the case of *Jackson v. Bartlett*, 8 Johns. 361, the court declared that the attorney on record for the plaintiff could not, by virtue of his general character as attorney, discharge a defendant from custody on execution, without satisfaction. There is no case to be found in which it has been adjudged that he had that power, though in *Payne v. Chute*, Rolf. 365, the clerks said it was the usual course for the attorneys of plaintiffs to acknowledge satisfaction, although they receive nothing. What was meant by that expression does not

distinctly appear; but it is impossible that it could have meant that it was the usual course to discharge judgments without satisfaction rendered to the client, or without his consent.

The question here is, whether the attorney can make a valid discharge of the defendant in execution, without the consent of the plaintiff, and without any satisfaction received either by the plaintiff or the attorney. In all the modern cases in which the question arose as to the right of taking a defendant a second time in execution, after he had been once taken and discharged on terms, the discharge is uniformly stated to have been by the plaintiff, or by his consent: *Vigers v. Aldrick*, 4 Burr. 2482; *Tompson v. Bristol*, Barnes, 205; *Jacques v. Withy*, 1 T. R. 557; *Bassel v. Saller*, 2 Mod. 136; *Clarke v. Clement*, 6 T. R. 525; *Tanner v. Hague*, 7 Id. 420.

If it had been understood to be the law that the attorney, on his mere motion and pleasure, and without any special authority or satisfaction, had power to do this, the books would not have been without some precedent to this effect. The sheriff may sometimes be misled, from the habit of taking his directions from the attorney; but when the rule is once well understood, there can be but little danger of injury from this source; while, on the other hand, the power assumed in this case would be enormous, and dangerous to the rights of clients. In the progress and until the consummation of the judgment, the attorney has, no doubt, and ought to have, a large and liberal discretion, but he cannot enter a *retraxit*; for that is a perpetual bar, and equivalent to a release. This was the resolution of the court in *Beecher's case*, 8 Co. 58, "because," said the court, "it shall be a perpetual bar, and, in a manner, a release, and the admittance of the court cannot prejudice the plaintiff in so high a degree. But in all dilatory matters, the admission of the court may turn the plaintiff, or demandant, to delay, but shall never bar the plaintiff, or demandant." The strongest instances of the power of the attorney is the allowing him to confess the action, without the will and consent of his client, and this shall bind, as was said by Montague, C. J., and Houghton, J., in *Gray v. Gray*, 2 Roll. 62.

The entry of a *remittitur* of part of the damages by the attorney before judgment, has been held valid in *Lamb v. Williams*, 1 Salk. 89; 6 Mod. 82; but it did not appear that the act was without or against the consent of the client. It was the opposite party that made the objection on a writ of error. And Rolle, 1 Roll. Abr. 201 m. pl. 2, cites a case in 4 Edw. III., in

which it was adjudged that after judgment the attorney for the plaintiff could not release the damages, for that his power after judgment was determined. His power after judgment extends only to the issuing of execution and receiving the debt. He cannot acknowledge satisfaction on record, without a new warrant for the purpose. The statute, sess. 34, c. 196, says it must be done by the party, or his attorney, "thereunto lawfully authorized." *Cage's case*, in Styles, 129, arose on the very point before us. The plaintiff's attorney, by fraud, without the consent of his client, acknowledged satisfaction upon the judgment, after the defendant was charged in execution, and then the defendant's attorney, without the consent of his client, acknowledged another judgment for the same debt. The court committed both the attorneys for their false practice, and said there was fraud against fraud, and that the parties were left to their remedies, one against the other, and that the court would examine the matter again on another day, but there is no further note of the case. As far as the case goes, it shows at least that the plaintiff was not thereby considered as losing his demand.

The court therefore see no reason to doubt of the opinion delivered on this point in *Jackson v. Bartlett*. It did not appear in that case, and does not in this, that the attorney ordered a discharge of the defendant from the custody of the sheriff under any pretext of a satisfaction, or of any consent from his client. There was here not even any imposition upon the officer. The officer must have known, as well as the attorney, that there was no satisfaction or plaintiff's consent, and it would be alarming to creditors if such a violation of duty between the attorney and the sheriff was permitted to destroy the plaintiff's right under his judgment.

The motion on the part of the defendant to set aside the verdict, is therefore denied.

Motion denied.

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## HARRISON v. SAWTEL.

[19 JOHNSON, 242.]

**ORIGINAL UNDERTAKING.**—Where the defendant being bound to indemnify a third person in a suit in which the latter had been arrested, requested the plaintiff to become a special bail for this third person, and promised to indemnify him, it was held that defendant's promise was an original obligation, and not within the statute.

**CERTIORARI** from the justice's court. It appeared that at the defendant Harrison's request, Sawtel had become special bail for one Foot in action against him, by reason whereof Sawtel was forced to expend sundry sums of money; and that Harrison, at the time of requesting Sawtel to become bail, had promised to indemnify him. The defense was the statute of frauds. The justice gave judgment for the plaintiff.

*P. Van Vechten*, for the plaintiff in error.

*Sedgwick, contra.*

**By Court.** This was not a promise to pay the debt, or answer for the default of another person. It was an original promise between the parties to it, that one of them would indemnify the other, if he would become special bail for a third person, whom the defendant was bound to protect and save harmless in the suit. It was done at the request and for the benefit of the defendant, as it saved him from becoming bail himself, or procuring some other person to become bail. The case had nothing to do with the statute of frauds, and there was a consideration for the promise, the advantage resulting to the defendant from the plaintiff's becoming bail. The defendant being answerable for the party sued, the becoming bail for the party, at the request of the defendant, was as beneficial as if the plaintiff had become bail for the defendant himself. The damages were proved by the expenses the plaintiff had been put to, in endeavoring to surrender Foot, and the defendant had acknowledged the plaintiff's demand, and paid part of it. The recovery, therefore, was just, and the judgment must be affirmed. Judgment affirmed.

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The doctrine of this case is approved in *Carville v. Crane*, 5 Hill, 487.

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## MOORE v. FOX.

[10 JOHNSON, 244.]

**PERFORMANCE WITHIN YEAR.**—To bring an agreement within the statute of frauds, it must be an express and specific agreement not to be performed within the space of a year; and if the thing may be performed within the year, it is not within the act. Consequently, where an agreement was made to pay a minister for his services two dollars a year, and it appeared that for several years payments had been made half-yearly, the promise was held to be binding.

**CERTIORARI** from the justice's court. The action was *assumpsit* to recover four dollars for two years' services as minister. It

appeared that the defendant Moore promised Fox to pay him two dollars a year for his services as minister and had paid that amount half-yearly for several years. The defendant now contended that the promise was within the statute of frauds and void. The case was tried by a jury who found for the plaintiff; upon which judgment was given.

By COURT. The promise was valid, and not within the statute of frauds, for it does not appear but that it was to be performed within a year. It was to be performed according and in proportion to the service rendered, and the render of service was to commence immediately; and as the defendant had for several years paid half-yearly, the jury had a right to presume that the promise was to pay half-yearly. To bring the case within the statute of frauds, there must be an express and specific agreement, not to be performed within the space of a year; and if the thing may be performed within the year, it is not within the act: *Fenton v. Embler*, 3 Burr. 1278. This was a clear case of an express agreement to pay for services to be rendered, and the recovery was just. The judgment must be affirmed.

Judgment affirmed.

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See this case followed in *McLees v. Hale*, 10 Wend. 429; *Plimpton v. Curtis*, 15 Id. 336; *Lockwood v. Barnes*, 3 Hill, 130; *Trustees v. Brooklyn Fire Ins. Co.*, 19 N. Y. 307.

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## BELL v. CLAPP.

[10 JOHNSON, 263.]

SEARCH-WARRANT, REQUISITES OF.—A search-warrant under the hand and seal of a justice, reciting information on oath that certain described goods had been stolen by specified parties and were concealed in a certain house, and commanding the officer to whom it was directed to enter that house in the daytime, search for the stolen articles, and bring them, with the owner of the house, or the person who had them in custody, before the justice, was held to be a valid warrant, without stating the name of the owner of the goods.

OFFICER'S POWER.—Under such a warrant the officer may break open the door of the house, if it is shut, and if, upon demand, it is refused to be opened.

TRESPASS *quare clausum fregit*. The defendant pleaded a justification that the act complained of was committed in the service of a search-warrant. Demurrer and joinder.

Woodward, for the plaintiff.

G. Strong and Slosson, contra.

By COURT. The matter set forth in the plea is a justification of the trespass. The search-warrant was founded on oath, and the information stated that one hundred barrels of flour had been stolen from the wharf, in the first ward, by Richard and Isaac Jacques, and that the same, or a part thereof, was concealed in a cellar of Gideon Jacques. The plea then states that the warrant, being under the hand and seal of the magistrate, who was one of the special justices of the city of New York, an officer created by a public statute, and being directed to the constables and marshals, authorized and required them to enter the said cellar, in the daytime, and search for the flour, and to bring it, together with the said Gideon, or the person in whose custody it might be found, before the justice; that in pursuance of the warrant, the defendants, the one being a constable and the other a marshal, did go to the cellar, which was a part and parcel of the dwelling-house of the plaintiff, and, after being refused entrance, did open the door by force and seize the flour in as peaceable a manner as possible. This, then, was a valid warrant duly executed by these officers. The warrant had all the essential qualities of a legal warrant. It was founded on oath, and was specific as to place and object, and the stolen goods were taken, and taken in as peaceable a manner as the nature of the case admitted.

In *Entick v. Carrington*, 2 Wils. 265; 11 St. Tr. 313-316, Lord Camden admitted a search-warrant, so well guarded, to be a lawful authority. The warrant did not state in whom the property of the flour resided—nor was this essential to its validity; a person may even be indicted and convicted of stealing the goods of a person unknown. Nor did it affect the legality of the warrant that it directed the officer to bring Jacques, to whom the cellar belonged, or the person in whose custody the flour might be found. It was impossible for any warrant to be more explicit and particular; and it would, probably, have been the duty of the officer to have arrested any person in possession of the stolen goods at the place designated, without any directions in the warrant, and to have carried him before the justice for examination.

Sir Mathew Hale, in one part of his treatise, *H. P. C. v. 2*, 114, 116, 117, denies to the officer the right of breaking open the door, on a warrant to search for stolen goods. But he afterwards, *Id.* 151, admits this power in the officer, if the door be shut, and if upon demand it is refused to be opened. This last opinion is founded on the better reason, for search-warrants

are often indispensable to the detection of crimes; and they would be of little or no efficacy without this power attached to them. All the checks which the English law, and which even the constitution of the United States, have imposed upon the operation of these search-warrants, and with the manifestation of a strong jealousy of the abuses incident to them, would scarcely have been thought of, or have been deemed necessary, if the warrant did not communicate the power of opening the inter door of a house. In the case of *Entick v. Carrington*, it was asserted by the counsel for the defendant, that on a search-warrant to search for stolen goods, the officer might break open doors, etc., and this power was not questioned by the other side, nor by Lord Camden in the able and elaborate view which he took of the legality and effect of these warrants.

The defendants are, accordingly, entitled to judgment upon the demurrers.

Judgment for the defendants.

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See *Grumon v. Raymond*, *ante*, 200.

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## JACKSON v. KISSELBRACK.

[10 JOHNSON, 336.]

**AGREEMENT CONSTITUTING LEASE.**—A memorandum of agreement recited that a farm was let for a certain yearly rent in wheat during the lives of the lessee and his wife, the place to be surveyed at a certain time thereafter, when a lease would be formally made. The lessee held possession for fourteen years, paying the yearly rent. This was held to amount to a lease or present demise; and that an interest having passed under it, parol evidence of a disclaimer was inadmissible.

**EJECTMENT.** The title of plaintiff's lessor, Livingston, was proved. The defendant gave in evidence the following instrument: "Memorandum of an agreement made the fifteenth of January, 1798, between Henry Livingston, of, etc., and Yury Kisselbrack, of, etc., witnesseth that the said Henry Livingston hath set and to farm let unto the said Y. K. all that farm, etc., for the rent of, etc., yearly, for and during the term of the natural life of him, the said Yury and his wife, the place to be surveyed on or before the first day of June next ensuing this date, and then the said Y. K. is to take a lease for the same, etc." The defendant produced a receipt for rent dated February, 1810. The plaintiff proved service of notice, dated August 17, 1811, upon the defendant to quit on the first of March, 1812.

Several witnesses testified as to a disclaimer by defendant of plaintiff's title.

A verdict was taken for the plaintiff by consent, and the cause submitted without argument.

By Court, SPENCER, J. The question presented by this case is, whether the instrument produced amounted to an actual lease or only to an agreement for a lease. There are words of present demise, to wit, "Hath set and to farm let." The estate granted and the terms of the demise are quite definitive and explicit; but it provides that a lease shall be given at a future day. This last circumstance has generally given a character to the instrument of an agreement for a lease, as contradistinguished from a present demise. None of the cases will be found to contradict the position that where there are apt words of present demise, and to these are superadded a covenant for a further lease, the instrument is to be considered as a lease, and the covenant as operating in the nature of a covenant for further assurance. In *Goodtill v. Way*, 1 T. R. 735; *Doe v. Clare*, 2 Id. 739; *Doe v. Ashburner*, 5 Id. 163; *Doe v. Smith*, 6 East, 530, there were no words precisely, aptly and importing present demises, and it was held that in providing for the execution of leases, *in futuro*, it was the intention of the parties that the instruments should not operate as leases. In *Doe v. Ashburner*, 5 T. R. 103, the case of *Barry v. Nugent*, in error from the king's bench in Ireland, was admitted by Lord Kenyon to be correctly decided. The words were, "be it remembered that J. Barry hath let, and by these presents, doth demise." The instrument contained an agreement that leases, with powers of distress and clauses of re-entry, etc. be drawn and signed at the request of either party.

In this case, the court of king's bench was clearly of opinion that the articles operated as a present demise; and that the agreement for a more formal lease was merely in further assurance. In speaking of this case, Lord Kenyon said the words were express and unequivocal, and could have no other meaning than that given to them, namely, that they should operate as a present demise. The case of *Baxter v. Browne*, 2 Bl. 973, is much in point. The agreement was to grant a lease to Browne of the premises, and they did thereby set and let to him all, etc., provided that the said lease shall be void on non-payment of rent, etc., and that such lease shall contain the usual covenants, etc. The defendant entered in pursuance of the agreement, and paid rent; and it was held by all the judges, that it was clearly a good lease *in presenti*, with an agreement to exe-

cute a more formal and perfect lease *in futuro*. They observed that the operative words let and set are in the present tense; they laid stress on the fact that there had been a possession of fourteen years, and the acceptance of rent, observing, "that under such circumstances, if the words of the lease can import an immediate legal demise, the court will support it as such;" and they add, "that it will be evident from the cases cited which we have looked into and compared."

In the present case, the lease contained words of present demise, and the defendant has held under it for about fourteen years. It is impossible to distinguish this case from *Baxter v. Browne*, and I presume, after so long a possession under the instrument, and an acquiescence by the lessor of the plaintiff, the court will give it the construction contended for by the defendant if they legally can. It is unnecessary to compare and examine the various cases which have been determined, involving the consideration of a lease, or an agreement for a lease; it is believed that there is no case of a present demise by apt words, followed by a possession, in which the instrument has not been held to pass an immediate interest. If an interest passed, no subsequent disclaimer by parol can abrogate it, for a freehold interest cannot be divested by words *in pais*: 8 Cruise, 367.

Judgment for the defendant.

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Treating of the doctrine of this case, Kent (4 Com. 105), says: "It is sometimes a question, whether the instrument amounts to a lease, or is merely a contract for a lease. It is purely a question of intention; and the cases sufficiently establish the rule of that construction to be that though an agreement may on one part of it purport to be a lease, yet if from the whole instrument, taken and compared together, it clearly appears to have been intended to be a mere executory agreement for a future lease, the intention shall prevail. So a contrary conclusion is drawn when the intention, from the instrument, appears to create a subsisting term, though it contemplated a more formal lease to be made."

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## JACKSON v. McCALL.

[10 JOHNSON, 377.]

**PAROL DECLARATIONS.**—Parol declarations and admissions of a person in possession of land as to the true boundary line between his land and that of another are admissible in evidence.

**PRESUMPTIONS AS TO TITLE.**—Where a person died in possession of land and his son and heir at law succeeded to the possession and continued therein undisturbed for above eighteen years, it was held that a purchase of the title by the ancestor might be presumed; and where there was an order of the colony of New York, in 1764, for the survey of the lot in favor of

a certain party, and which was made, but no patent founded thereon could be found, it was held that a patent to that person and a deed from him to the ancestor might be presumed for the sake of quieting the possession.

**ENFORCEMENT.** The dispute in this case arose in regard to the boundary line between two tracts of land known as McPherson's lot and Provoost's lot. The plaintiff gave in evidence an exemplification of an act of the legislature confirming to Daniel McDonald, the plaintiff's lessor, all that tract of land previously allotted to John Provoost by a survey of November 2, 1764, and produced sundry patents to different persons to fix the location of that lot. Plaintiff also gave the testimony of one Webster, a surveyor, from which it seemed that the demanded premises were comprised in the Provoost or south lot, the tract held by plaintiff. It was admitted that defendant was in possession of one half of the lot granted to McPherson forty-one years ago, and that in defendant's tract the demanded premises were included. Testimony was produced showing an occupation to a certain line of old-marked trees for forty-one years; and evidence was offered of the declarations of John McDonald, the lessor's father, who was in possession of the Provoost lot eighteen years before the commencement of this action, to show that he understood the division line of marked trees to be the true line, and had made a division fence on that line. Evidence of other declarations of John McDonald was offered to prove that the division line, as contended for by defendant, had been run by the king's surveyors. Objections to this evidence were overruled, and a verdict found for the defendant.

*Crary and Van Vechten*, in support of a motion for a new trial, cited 1 Johns. 156; 2 Cruise's Dig. 558; 1 Rev. Laws. 562; Run. Ejec. 59; Cro. Eliz. 331.

*Skinner and L. R. Shepherd, contra.*

**By Court.** The presumption is that John McDonald was in possession of the Provoost lot when he made the confessions which were given in evidence on the part of the defendant. He was in possession eighteen years before the trial, occupying and claiming the lot as his own. How much earlier he took possession does not appear; and as nothing to the contrary appears, the jury would have been warranted to presume that he was in possession under a claim of title as early as 1776, when he admitted that he had been present with the surveyor who run out the line between that and the adjoining lot. His confessions

were, therefore, admissible as to the original line, and he repeatedly said that he was present when the line was run out by the king's surveyors, and the line set up by the defendants is the line he referred to.

This John McDonald died in possession, and the lessor of the plaintiff succeeded as his son and heir, to the possession of the Provoost lot, and in which he has since continued. We are, then, to conclude that the father purchased the Provoost title at an early day, and from the fact of the order of the council, and the original survey by government in 1764, and the recognition of it in the patent to McKenzie in 1765, and the continual and undisturbed possession by the family of the lessor, a patent to Provoost, and a deed from him to the elder McDonald, might even have been presumed for the sake of quieting the possession: 3 Johns. Cas. 118. In the case of the *Mayor of Hull v. Horner*, Cowp. 102, Lord Mansfield held that a grant or charter from the crown, which ought to be by matter of record, might, under circumstances, be presumed, though within time of legal memory. The fact in such a case is presumed for the purpose, and from a principle of quieting the possession, and not because the court really think a grant has been made. The act of the legislature, under which the lessor shows a legal title, without the aid of presumption, is nothing more than a release or quitclaim from the people of this state for their remaining right (if they had any) to the Provoost lot; and that statute never meant to vest in McDonald greater rights than he would have had if the patent to Provoost had been on record.

The confessions of McDonald are then conclusive upon the lessor of the plaintiff, and when we add to this that the Provoost and McPherson lots have been held and occupied for forty-one years previous to the trial, to the line set up by the defendant, and that the occupants on both sides, and especially the ancestor of the plaintiff, and the plaintiff himself, by his act in building a stone wall on that line, have recognized that as the true line, the opinion of the judge at the trial was correct, and that line ought not now to be disturbed.

Motion on the part of the plaintiff to set aside the verdict denied.

Motion denied.

## DOLE v. LYON.

[10 JOHNSON, 447.]

**PUBLICATION OF LIBEL.**—The publisher of a libel is liable to a party libeled, notwithstanding the libel is accompanied with the name of the author.

**LIBEL.** The case appears from the opinion. A verdict was found for the plaintiff, which defendant moved to set aside.

*J. Russell and R. M. Livingston*, for the defendant.

*Foot and Van Vechten*, *contra*.

By Court, KENT, C. J. 1. The material point raised in this case is, whether the publisher of a libel is responsible to the party libeled, notwithstanding the libel is accompanied with the name of the author. In the case of *Davis v. Lewis*, 7 T. R. 17, Lord Kenyon observed that if a person say that such particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defense to an action of slander. There was a similar *dictum* of the judges, in the *Earl of Northampton case*, 12 Co. 132, but in neither of these cases was this the point in judgment; and it may well be questioned whether even this rule as to slanderous words ought not to depend upon the *quo animo* with which the words with the name of the author are repeated. Words of slander with the name of the author may be repeated with a malicious intent and mischievous effect. The public may be ignorant of the worthlessness of the original author, and may be led to attach credit to his name and slander, when both are mentioned by a person of undoubted reputation. There is, however, a distinction between oral and written or printed slander, which is noticed in all the books; and the latter is deemed much more pernicious, and will not so easily admit of justification. There is no precedent of such a justification in an action for a libel. In *Mailland v. Goldney*, 2 East, 426, the court of K. B., with a studied caution, waived the application of the rule in *Lord Northampton's case*, to written slander, and the cause went off on another distinction. No point is more fully established than this, that all who are concerned in a libel, as the composer of it, or procurer of it to be composed, and the publisher, and the procurer of it to be published, are responsible in law: Hawk. tit. Libel, s. 10. In *King v. Paine*, Mod. 163, the court, in speaking of the persons who are makers or publishers of a libel, observed that "all persons who concur and show their assent or approbation to do an unlawful act are guilty; so that

murdering a man's reputation by a scandalous libel may be compared to murdering his person, for if several are assenting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide."

The same principles which are here applied to public libels are applicable to private calumny; and the doctrine which renders all equally liable to an action who are any ways concerned in the unlawful publication of a libel, was very explicitly recognized by this court in the cases of *Lewis v. Few*, 5 Johns. 1, and of *Andreas v. Wells*, 7 Johns. 260 [5 Am. Dec. 267], and it was well supported by the authorities to which the court in those cases referred. Individual character must be protected, or social happiness and domestic peace are destroyed. It is not sufficient that the printer by naming the author gives the party grieved an action against him. This reason of the rule is mentioned in *Lord Northampton's case*, and repeated by Lord Kenyon. But this remedy may afford no consolation, and no relief to the injured party. The author may be some vagrant individual who may easily elude process; and if found he may be without property to remunerate in damages. It would be no check on a libelous printer, who can spread the calumny with ease, and with rapidity, throughout the community. The calumny of the author would fall harmless to the ground without the aid of the printer. The injury is inflicted by the press, which, like other powerful engines, is mighty for mischief as well as for good. I am satisfied that the proposition contended for on the part of the defendant, is as destitute of foundation in law as it is repugnant to principles of public policy.

2. The ground on which much of the evidence offered on the part of the defendant was rejected, is too plain to need illustration. It was immaterial or impertinent. It referred to matters happening after the publication of the libel, and which had no concern either with the fact of publication, or with the truth of the charges. To admit testimony so wholly disconnected with the matter in issue, would lead to idle and endless discussion. The view with which that evidence was offered is stated in the case, and it was in that view the evidence was overruled. It was not offered or wanted in any other view. The acts of immorality which the defendant offered to prove were not specified in the notice annexed to the plea, and to admit proof of them would have been taking the plaintiff by surprise.

3. The charge to the jury has been deemed erroneous, because it was observed "that the jury might presume from the circum-

stances that the defendant had been backed by the author, or some other person."

The circumstance from which this might have been inferred was the note to the defendant, with which the libel was introduced, and which stated that the libel had been refused a place in another gazette. This was awakening the attention of the defendant to the nature of the publication and putting him upon his guard, and enabling him to arm himself against the consequences. He was therefore not an object of sympathy as an inadvertent, ignorant or heedless, publisher; in that view the remark was made, and the reference by the jury would have been natural and just. Here was no misdirection in point of law. It was bringing to the attention of the jury one among many other circumstances to be considered in assessing the damages. There are numerous, and many of them slight, circumstances which go, in such cases, to vary in a greater or less degree the *quantum* of damages. They are not to be defined and brought to precise rule, because they grow out of each particular case. One of these circumstances was the fact in question, and it was probably mentioned with no great stress, and with only a passing attention. There is no reason to believe that it was a material fact in constituting the amount of the damages. The court perceive ample cause for the verdict in the atrocity of the libel, and the still greater atrocity of the charges spread out at large in the notice of the plea, and in the proof of which the defendant utterly failed. The court are bound, on this subject, to judge how far the observation was material as well as erroneous. It was said by Mr. Justice Buller, 5 T. R. 425, that, though the judge may have made some little mistake in his directions to the jury, yet if justice be done, the court ought not to interfere. The court are always bound, in the exercise of a sound discretion on the subject of new trial, to determine how far the observation of the judge was material, and affected the merits of the case. Otherwise, as this court observed in *Fleming v. Gilbert*, 3 Johns. 528, there would be no end to new trials, and the remedy would be worse than the disease.

But in fact there was no imputable error in the observation to the jury. It was a circumstance fit and proper for the consideration of the jury, so far as an appeal to their compassion might have been made in favor of a harmless publisher. Suppose the defendant had inserted as a preamble to the libel that he had been indemnified against all the pecuniary consequences

of that publication, by a person of large fortune in that county. Would not that fact, when admitted in proof before them, be proper for the consideration of the jury is assessing the damages? There is no rule and no case which would exclude it. This was the same case in a less strong degree, provided the evidence would warrant the inference. It is to be observed that the fact in question was before the jury. It was in evidence as part of the publication, and no objection made to it as illegal. In *Hotchkiss v. Lathrop*, 1 Johns. 286, the evidence that the defendant was indemnified for publishing the libel, was objected to when offered; and on motion for a new trial, the court rejected the motion in respect to that ground, by merely saying that the circumstances of the defendant were not known to be bad, and the relevancy of the testimony did not appear. But the court express no opinion on a different state of facts, even as to that point.

The motion on the part of the defendant for a new trial ought, therefore, to be denied.

Judgment for the plaintiff.

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## JACKSON v. BURGOTT.

[10 JOHNSON, 457.]

**PURCHASE WITH NOTICE OF PRIOR DEED.**—Where a subsequent purchaser whose deed is registered at the time of his purchase, has notice at the time of a prior unregistered deed, his deed will be postponed to such deed; and a purchase so made will be deemed fraudulent, the question of notice and fraud in such case being cognizable in law as in equity.

**EJECTMENT.** Both parties claimed to derive title from Ananias Conkling; the plaintiff under a deed dated May 2, 1796, from Conkling to James Irwin, and recorded March 2, 1812, and a release from Irwin to Gilbert, plaintiff's lessor, dated November 17, 1804, and recorded August 30, 1805; the defendant under a deed dated November 25, 1804, from Conkling to Samuel Tiffany, recorded the day following. To impeach the validity of the Tiffany deed, plaintiff produced evidence of knowledge on the part of Tiffany and the defendant of plaintiff's prior unrecorded deed. The facts and the questions arising in the cause appear from the opinion of the court, for whose decision the case was submitted without argument.

By Court, KENT, C. J. The points submitted to the court on the part of the defendant in opposition to the plaintiff's claim of

title are: 1. That the deed first registered must at all events prevail against an unregistered deed; the statute having declared the latter as against the former fraudulent and void; 2. That the defendant was a *bona fide* purchaser without notice; 3. That if he had notice, the lessor of the plaintiff cannot avail himself of that fact in a court of law. Neither of these objections appear to be well founded.

1. The facts in the case establish the conclusion that the defendant and every other person, through whom he derived title had at the time of their purchase, actual notice of the prior conveyance to Irwin & Gilbert. The purchase of Tiffany had every appearance of a gross fraud. Conkling had, as early as 1796, sold the lot to Irwin for the consideration of four hundred and eighty pounds or twelve hundred dollars; and in 1804, he gave a gift-claim deed of the same lot to Tiffany, for the consideration of one hundred dollars. It appears that Tiffany was a hired man in the service of Irwin, and the purchase was effected at the instance of Irwin, for the avowed purpose of defeating the operation of a deed he had previously given to the lessor of the plaintiff. Irwin furnished the money, and Tiffany was only a nominal trustee to Irwin, and the instrument of his fraud. The next conveyance in the chain of the defendant's title is the deed from Tiffany to Murray; but as Murray purchased at the instance of Irwin, and gave no consideration, he was not a purchaser for a valuable consideration, within the act, and was also a mere nominal trustee for Irwin. The next conveyance was from Murray to Hunt, from whom the defendant purchased. While Hunt was in negotiation with Murray for the purchase of the lot, he was informed that Gilbert, the lessor, claimed the lot, and had title, and was cautioned against purchasing. He, notwithstanding, purchased, and took a quitclaim deed, and gave a trifling consideration. And when the defendant purchased from Hunt he was informed by a witness that he had a letter from the lessor of the plaintiff, stating particulars, and informing him that he had a good title without defect, except that his deed had not been recorded in season. The contents of this letter were stated to the defendant, and he was cautioned against buying of Hunt, as Gilbert was the true owner.

It ought further to be observed, that the deed from Irwin to Gilbert was recorded as early as 1805, and before even Tiffany had undertaken to sell to Murray. These facts put the point of actual notice beyond all controversy; and the only question is, whether these several conveyances, under which the defend-

ant claims and which are so infected with fraud, are to be sustained in a court of law, merely because he can show a priority of registry.

2. We have always taken it for granted, without any formal discussion, that notice would supersede the prior registry, even in a court of law. But as the point is now, for the first time, distinctly raised in this court, it may merit some consideration. It may be assumed as a settled principle in the English law, that where a subsequent purchaser, whose deed is registered, had notice at the time of his purchase of a prior registered deed, the prior deed shall have the preference; for the object of the register acts is to give notice to subsequent purchasers, and in the case stated, the object of the act is answered, and his purchase under such circumstances is a fraud. It is considered as done *mala fide*, by assisting the original vendor to defraud the prior vendee; and the courts will not suffer a statute made to prevent fraud to be a protection to fraud. It may often be a question, what facts or circumstances will amount to notice sufficient to charge the party; but if the fact of notice be once made out, there is no doubt in the books but that as against such prior deed, the subsequent registered conveyance is to be adjudged fraudulent and void. This principle I apprehend to be equally just and solid, and it cannot but excite surprise that the French ordinance of 1747, compiled under the auspices of so excellent, pure and distinguished a magistrate as Chancellor D'Aguesseau, will admit of nothing, not even of the most actual and direct notice, to countervail the prior registry: Butler's Note, 249, s. 11, to Co. Lit., lib. 3. M. Pothier does not hesitate, however, to question the policy and equity of the ordinance: *Traité des Substitutions*, secs. 1, 6. The foundation of the English doctrine is the fraud of the second purchase under a knowledge of the first; and when that appears, as it will in almost all cases where the second purchase is made with the knowledge of the first, and with a view to defeat it, it cannot consist with the honor of the law, or with the wisdom of the administration of justice, that the fraud should remain triumphant. An unregistered deed is in no case void; it is always good as against the grantor and his heirs; and the question here is between a valid and fraudulent deed.

The case of *Le Neve v. Le Neve* was decided by Lord Hardwicke in 1747, and it contains the fullest illustration, and the most decisive vindication of the rule: 3 Atk. 646; 1 Ves. 64; Amb. 436. He says that the rule was first applied to the stat-

ute of 27 Henry VIII., for the enrollment of bargains and sales; and that the construction had been uniform, that if a subsequent bargainee had notice of a prior bargain and sale he was equally affected with the notice, as if the prior purchase had been a conveyance by feoffment. When the register acts were introduced, the same rule of construction was applied to them; and to show the absolute necessity of the construction, Lord Hardwicke supposes the case of a purchaser of lands in a register county, employing an attorney to register the conveyance, who, neglecting to do it, buys the estate himself and registers his own conveyance; and he then asks, shall this be allowed to prevail? To allow the statute to have this effect, would be permitting it to be made the instrument of fraud, and would shock the moral sense of mankind. The same rule, as to notice, must be applied to cases arising under our acts, relative to the military bounty lands. The object of the registry under these acts was not only to detect fraud, but "to prevent frauds in future;" and the effect of the first registry is declared in the very terms used in the statute of 7 Anne, c. 20. In cases arising under these acts, it has always been assumed as a conceded point, that notice of the prior deed would supersede the effect of the prior registry: *Jackson v. Hubbard*, 1 Cai. 82; *Jackson v. Given*, 8 Johns. 137 [5 Am. Dec. 328].

3. The only point that remains to be considered in this case is, whether the question of notice is not exclusively of equity cognizance. The decisions have come from the court of chancery, but whenever the point has occurred to the judges of the courts of common law, they have always recognized the existence and solidity of the rule: Lord Mansfield in 1 Burr. 474, and Lord Kenyon in Peake's N. P. 190, 191. And if the question of notice be a question of construction of the statute, and not merely of a trust or equity binding on the conscience, the cognizance of it must belong equally to a court of law. The design of the act was to give notice by means of the registry, and thereby prevent imposition, mistake and fraud. The court of exchequer in *Cheval v. Nichols*, 1 Str. 664, admitted that the statute only intended to give such notice as would prevent fraud, and that the statute never intended to relieve a purchaser with notice, though the first deed was not registered. It is, therefore, a question on the interpretation of the registry acts, and upon every sound principle courts of common law have cognizance of the case. Courts of law and equity are equally bound to give statutes a sound interpretation, in prevention of the

mischief, and are equally bound to carry the intention into effect; and courts of law have concurrent jurisdiction in all cases of fraud. Fraud will invalidate, in a court of law as well as in a court of equity, and annul every contract and every conveyance infected with it. The ground of the interference of the courts in these cases of notice is the fraud. In *Fermor's case*, 3 Co. 77, it was resolved that a fine levied by fraud was not binding, and that "such fraudulent estate was as no estate in judgment of law," and it was declared that all acts and deeds, judicial as well as extrajudicial, if mixed with fraud, were void. When the statute says that every deed not recorded shall be adjudged fraudulent and void, against a subsequent purchaser for valuable consideration, whose deed shall be recorded, it undoubtedly meant a subsequent purchaser in good faith, and who did not purchase with a fraudulent intent. A subsequent purchaser, *mala fide*, was not within the purview of the act, and not intended to be protected; for the statute never intended to give sanction to fraud, or to render a fraudulent act legal. That is impossible. Consequently in the case of a second purchaser with notice, no estate passes to him by the deed. "Such fraudulent estate is as no estate in judgment of law."

Judgment for the plaintiff.

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See *Ludlow v. Gill*, 1 Am. Dec. 694, and note.

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## COOK v. COMMERCIAL INS. Co.

[11 JOHNSON, 40.]

**BARRATRY.**—Barratry may be committed by the master of a ship in respect to the cargo, although the owner of the cargo is at the same time owner of the ship; and although the master is supercargo, or consignee for the voyage.

**ACTION** on a policy of insurance on the cargo of the schooner *Despatch*, "at and from St. Jago de Cuba to New Orleans, and at and from thence to New York." The plaintiffs claimed a total loss by the barratry of the master. The ship and cargo were owned by the plaintiffs; and the master was the supercargo and consignee. The outward cargo was disposed of at St. Jago de Cuba, and the proceeds invested in a return cargo of indigo, tortoise shell and specie, equal in value to the amount insured. On the arrival of the vessel at New Orleans, the master fraudulently converted the specie to his own use and absconded. Verdict for the plaintiffs, subject to the opinion of this court.

*D. B. Ogden*, for the plaintiffs.

*Wells, contra.* There cannot be barratry in relation to the cargo when it is owned by the owner of the vessel. The act done must be to the prejudice of the owner of the vessel: *Marsh. Ins.* 375; *Calhoun v. Ins. Co. of Penn.*, 1 Binn. 293, 322. For the fraudulent conduct of the master in regard to the cargo, the owners of the vessel are responsible to the owners of the cargo; but in this case they are the same parties. The plaintiffs, as owners of the vessel, cannot be answerable to themselves as owners of the cargo; so that there is no injury, no barratry. All the cases prove, upon examination, to be insurances upon the vessel, or cases where the cargo belonged to a third person: *Stamma v. Brown*, 2 Str. 1174; *Ellon v. Brogden*, Id. 1264; *Vallejo v. Wheeler*, Cowp. 143; *Nutt v. Bourdieu*, 1 T. R. 313; *Lockyer v. Offley*, Id. 252; *Ross v. Hunter*, 4 Id. 35; *Moss v. Byron*, 6 Id. 379; 2 Cai. 67, 222; 3 Cai. 1, 89; 1 Johns. 229; 8 Id. 272.

The master was the supercargo and consignee of the cargo, and the fraudulent act may be referred to his character as consignee; the owners of the vessel are liable for the acts of their mercantile agents, and cannot shift the responsibility to the insurers: *Emerigon*, Dig. lib. 14, tit. 1, s. 5; *Crousillat v. Ball*, 4 Dall. 294 [2 Am. Dec. 375]; *Kendrick v. Delafield*, 2 Cai. 67, 72.

By COURT. There is no ground for the distinction taken by the defendants' counsel, that the master can only commit barratry as to the vessel, and as the cargo belonging to third persons, but not as to the cargo which is owned by the owner of the vessel. The law permits the owner of the ship to be insured against the misconduct of the captain and crew, though they are his own agents, and persons of his own choice. It is too late to question the law, whatever we may think of its policy. And as the owner of the vessel can be insured against the barratry of the master, committed against the vessel, there is no reason why he should not be equally insured as to the cargo. The principle is the same, and all the cases in the English law, which define barratry, render it sufficiently comprehensive to embrace the owner of the cargo, notwithstanding he may happen to be also owner of the ship. Barratry includes every species of fraud, concerning either the ship or cargo, committed by the master, in respect to his trust as master, to the injury of the owner or shippers. It was for the defendant to show the exception, and the books afford no pretense for any; on the con-

trary, the case of *Crousillat v. Ball*, 4 Dall. 294 [2 Am. Dec. 375], is an authority against the exception. That was a policy on ship and cargo, and both ship and cargo were owned by the plaintiff, who recovered on the charge of barratry committed particularly in respect to the cargo.

Nor can the barratrous act be referred to the master in his charter of consignee. The cargo consisted partly of specie, and when the captain arrived at New Orleans, he converted the specie to his own use, abandoned the voyage, and absconded. This was clearly a criminal breach of duty in his character of master of the vessel, and though he had a superadded character of consignee, the act is properly imputable to him as master: 8 East, 140; 2 Cai. 72.

Judgment for the plaintiff for a total loss.

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## JACKSON v. MATSDORF.

[11 JOHNSON, 91.]

**NOTION OF RESULTING TRUST.**—A father paid the purchase-money and took a deed in the name of his daughter, a minor, the deed expressing a consideration paid by him. He held possession of the premises for thirty-eight years. The daughter and her husband having surreptitiously obtained the deed, conveyed the property. It was held that the purchaser from her, for value, had notice of the resulting trust, and was guilty of fraud, and that a release to the father might be presumed.

**ADVANCEMENT—WHEN NOT PRESUMED.**—The purchase of land by a parent, in the name of a minor child, is not to be deemed an advancement, where it expressly appears that such was not the parent's intention, as for instance, where the object was to protect the title against creditors.

**EJECTMENT.** It appeared that in June, 1766, Benjamin Benson being seised of the premises in question in fee, executed a deed therefor to Keziah Benson, in consideration of one hundred and twelve pounds, paid by Ambrose Benson, Keziah's father. This instrument remained in Benjamin's possession until fraudulently obtained by Keziah and her husband, Morehouse, who had the same recorded. Upon learning that this deed had been so taken away, Benjamin executed another deed to Ambrose himself. In 1786, Morehouse and his wife Keziah executed a quitclaim deed, for one hundred and twelve pounds, to Benjamin Benson, the plaintiff's lessor. At the time of the deed from Benjamin to Keziah, Ambrose was in possession, and so remained until the time of his death in 1802, using and improving the same as his own. Evidence was produced tending to show that while Ambrose was in possession he had frequently

said that the land belonged to Keziah, other evidence of Ambrose's declarations was offered and received to the effect that the deed had been taken in Keziah's name to avoid having the land levied upon in an action which Ambrose feared would be prosecuted on a certain bond. At the time of the deed, Keziah was an infant. The defendants claimed under Ambrose.

Verdict for the plaintiffs, subject to the opinion of this court.

*J. Tullmudge and P. Ruggles*, for the plaintiff, urged that the deed was intended as an advancement to Keziah, not as a resulting trust in favor of Ambrose: 1 Ch. Cas. 27, 296; 2 Id. 231; 2 Freem. 252; 1 P. Wms. 608; 1 Vern. 19.

*Emott, contra.*

By Court, THOMPSON, C. J.\* It is a well settled rule of law, that if A. buys land, and takes a conveyance in the name of B., it is a resulting trust for him who paid the purchase-money, raised by implication of law, and therefore not within the statute of frauds. The defendants in this case claim under Ambrose Benson, who, it is admitted, paid the consideration-money, but the deed of the ninth of June, 1706, was taken in the name of his daughter Keziah, under whom the lessor of the plaintiff claims by deed dated November 3, 1786.

It is a question which has often been agitated in chancery, whether, when a parent purchases land in the name of his child, it shall be deemed a trust for the father or an advancement for the child. When the child is under age, it has generally been considered an advancement, though Lord Hardwicke, in the case of *Stillman v. Ashtown*, 2 Atk. 479, said he thought the cases on that subject had gone full far enough. But no case will be found where a purchase so made has been held an advancement when it expressly appears to have been the intention of the parent that it should not be considered as such, as it does in the case before us. It is in proof derived from the confessions of the lessor himself, who was the grantor, that the deed was given to the daughter for the purpose of avoiding some expected difficulties, and with an understanding that when Ambrose Benson should get rid of these difficulties, the deed was to be taken up and another given to Ambrose himself. This, doubtless, was the reason why the deed remained in the possession, or under the control, of Ambrose, until fraud-

\* Kent was appointed chancellor in February, 1814, when Judge Thompson became chief justice, Platt, J. being appointed to fill the vacancy. The court was now composed of Thompson, C. J., Spencer, Van Ness, Yates and Platt, JJ.

ulently taken away by Keziah and others. No objection was made to this evidence, nor, indeed, could any be made; for it appears on the face of the deed to be a resulting trust, but such a trust not being within the statute of frauds may be proved by parol evidence.

This was considered as a settled rule of law in the cases of *Jackson v. Stenbergh*, 1 Johns. 153; and *Foot v. Colvin*, 3 Id. 216 [3 Am. Dec. 478]. If this is not to be considered an advancement to the daughter, as we think it clearly cannot, then there was no trust completed by a delivery of the deed to the trustee. Ambrose Benson being the person beneficially interested, and retaining the deed in his own possession, no interest vested in the trustee. Had the deed been intended as an advancement, possibly the delivery to Ambrose might have been considered as accruing to the benefit of his daughter. And in this view of the case the title of Ambrose was complete by length of possession.

But admitting a delivery of the deed, the interest created thereby was a resulting trust for Ambrose Benson, who paid the consideration money; and if the legal estate was by that deed vested in his daughter Keziah, the lessor of the plaintiff cannot avail himself of his purchase from her and her husband, in the year 1786, since he purchased with full notice of the trust, and was, therefore, guilty of fraud, although he might have paid a valuable consideration: 1 Cruise's Dig. 485; Fonb. Eq., b. 2, c. 6, s. 2, and note. If that deed was not absolutely void, yet the lessor of the plaintiff would be considered a trustee for Ambrose Benson, who was the real owner; and if necessary, the lapse of time is amply sufficient to warrant the presumption of an execution of the trust, by a release to Ambrose, the *cestui que trust*. Besides, it appears from the confessions of the lessor, that upon discovering that the deed of 1766, given by him to Keziah, had been surreptitiously taken away, he gave another deed to Ambrose Benson himself, which deed, if it continued a warranty, would pass any title subsequently acquired by the grantor: Co. Lit. 265, a.

There is another and conclusive objection to the plaintiff's right to recover in this action, which is the adverse possession of Ambrose Benson at the time the deed was given by Morehouse and his wife, in 1786, to the lessor of the plaintiff. It is unnecessary to recapitulate the testimony on this point. An examination of it will abundantly show that Ambrose Benson, from the year 1866 until the time of his death, which was about

ten or twelve years ago, continued in possession of the premises in question, using and improving them as his own, and in hostility to any right or claim that might be set up under the deed to Keziah. The circumstances stated by some of the witnesses, that he sometimes called the farm Morehouse's and Keziah's is entitled to but little weight, in opposition to the mass of evidence showing that he held it in defiance of that title. In whatever point of view, therefore, this case is considered, there must be judgment for the defendants.

Judgment for the defendants.

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This case is considered and explained in *Everett v. Everett*, 43 N. Y. 223. Here it is decided that when one purchases land, and at his request the deed is made to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibition of the statute of uses and trusts no trust results in favor of the purchaser. Considering the principal case, the court say: "We are particularly referred to the case of *Jackson v. Matsdorf*, as authority for the appellant. That case occurred before the adoption of the Revised Statutes, which, as held by the leading opinion of Judge Comstock in *Garfield v. Hatmaker*, 15 N. Y. 475, has made such sweeping alteration in the law of uses and trusts, that it has wholly subverted the former rules as to a resulting trust in favor of the party paying the consideration, under which it was also formerly held that the interest of such party could be seized and sold as a legal estate on execution against him. This result arose, says that able judge, from the relation between the grantee and the person paying the purchase-money, but is entirely overthrown by the present statute of uses and trusts. There is a pure trust in favor of the creditor which he can enforce only in equity. \* \* \* In the case cited from 11 Johnson, the court appear to be uncertain as to placing their judgment upon the doctrine of a resulting trust, even in that day, and finally hold that the title of the person who paid the consideration in that case was good, by reason of his uninterrupted possession for forty years. It is worthy of observation that the plaintiff's lessor in that case obtained his conveyance with full knowledge that the deed to his grantor had been taken with the intention of having the title held for the benefit of the person who paid the consideration. The principle of a resulting trust in favor of the person paying the purchase-money was fully adopted in that case, and is as fully repudiated in 1 Rev. Stat. 723, sec. 51, and in 15 N. Y. 475." See 1 Perry on Trusts, secs. 123, 143, treating of the doctrine of the principal case.

## JENKINS v. WALDRON.

[11 JOHNSON, 114.]

**INSPECTORS OF ELECTION REFUSING VOTE.**—Officers required by law to exercise their judgment, are not liable for mistakes in law, when their motives are untainted with fraud or malice. Hence, an action on the case will not lie against the inspectors of an election for refusing the vote of a person legally qualified to vote, without alleging and proving fraud or malice on the part of such officers.

**CERTIORARI** from a justice's court. Waldron brought an action on the case against Jenkins and others, inspectors of election, and claimed damages for "wickedly and designedly" refusing to receive his vote. The plaintiff was a black man, and at the time he offered his vote, he tendered a certificate of his being a free man, under the hand and seal of Samuel Edmonds, one of the judges of the common pleas. The defendants rejected the vote solely on the ground that Edmonds was not at the time of giving the certificate, a judge according to law. The evidence as to the question whether Edmonds was or was not duly qualified as a judge need not be stated, the court passing merely upon the form of the declaration. The justice gave judgment for the plaintiff.

*Van Buren*, for the plaintiffs in error.

*Jas. Strong, contra.* The inspectors were ministerial officers merely: *Ashby v. White*, 2 Ld. Raym. 938, and are liable if they exceeded their authority. If the defendants below had any judicial power, still they are liable for its exercise in an improper, illegal or oppressive manner: 14 Vin. Ab. Judges, F. 579; 1 Ld. Raym. 467; 2 Lev. 50; 2 W. Bl. 1142, 1017, 1035; 1 Burr. 595; 5 Johns. 125; 7 Id. 549; 9 Id. 395 [*ante*, 290].

By Court, **SPENCER, J.** It is not necessary to the decision of this cause to pronounce any opinion on the question whether Judge Edmonds was a judge *de jure* or *de facto*, when he gave the certificate that the defendant had duly proved himself to be a free man; for admitting that Judge Edmonds was either, this action as laid is not maintainable. It is not alleged or proved that the inspectors fraudulently or maliciously refused to receive Waldron's vote; and this we consider to be absolutely necessary to the maintenance of an action against the inspectors of an election. The case principally relied on by the counsel for the defendant in error is that of *Ashby v. White*, 2 Ld. Raym. 938. There the declaration alleged that the rejection of Ashby's vote

was done fraudulently and maliciously, and although the jury found the defendant guilty, the judgment was arrested by three judges in opposition to the opinion of Chief Justice Holt. This judgment was afterwards reversed in the house of lords. The reasons for the reversal do not appear in the report of the case, but the ground of the reversal is distinctly stated in the resolutions of the lords, in answer to the resolutions of the commons reprehending the bringing the action and the judgment thereon. The first resolution of the lords states "that by the known laws of this kingdom every freeholder or other person having a right to give his vote at the election of members to serve in parliament, and being willfully denied or hindered so to do by the officers who ought to receive the same, may maintain an action in the Queen's courts against such officer to assert his right and recover damages for the injury:" 1 Bro. P. C. 49, 1 ed. The case of *Harman v. Tappenden*, 1 East, 555; and *Drewy v. Coullton*, in a note to that case, clearly showing that this action is not maintainable, without stating and proving malice express or implied on the part of the officers. In the case in the text, Lawrence, J., said: "There is no instance of an action of this sort maintained for an act arising merely from error of judgment;" and he cited Mr. Justice Wilson's opinion in *Drewy v. Coullton*, with approbation. In that case the suit was for refusing the plaintiff's vote. Justice Wilson considered it as an action for misbehavior by a public officer in the discharge of his duty, and that the act must be malicious and willful to render it a misbehavior; and he held that no action would lie for a mistake in law. In speaking of the case of *Ashby v. White*, he considered it as having been determined by the house of lords on that ground, from the resolutions entered into by them. The whole of Judge Wilson's reasoning is clear, perspicuous and irresistible; and is fully confirmed in *Harman v. Tappenden*. It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers, called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.

Judgment reversed.

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As to the exemption from liability of an officer acting judicially unless fraud or malice be shown, this case is cited in *Minklaer v. Rockefeller*, 6 Cow. 290; *Cunningham v. Bucklin*, 8 Id. 185, and in *Nash v. The People*, 36 N. Y. 616; see note to *Yates v. Lansing*, *ante*, 290.

## DANFORTH v. CULVER.

[11 JOHNSON, 146.]

**ACKNOWLEDGMENT OF DEBT BARRED BY STATUTE.**—Under the plea of the statute of limitations in an action on a promissory note, it was held that evidence that defendant had admitted he executed the note, but observed that it was outlawed, and that he meant to avail himself of the statute of limitations, did not amount to a promise to pay so as to entitle the plaintiff to recover.

**SAME.**—An acknowledgment of a debt barred by statute does not operate as a revival of the original debt, but is evidence only of a new promise, of which the former debt is the consideration.

**ASSUMPSIT** on certain promissory notes. Plea, *non-assumpsit* and the statute of limitations. The acknowledgment made by the defendant since the commencement of the suit, and relied upon by the plaintiff to take the case out of the statute, appears from the opinion. Verdict for the plaintiff by consent.

**By COURT.** The evidence to take this case out of the statute is, that the defendant, when the notes were shown to him, "admitted that he had executed them, but observed that they were outlawed, and that he meant to avail himself of the statute of limitations." Even if we were to admit the authority of all the adjudged cases on the point in the English courts, we should not think this to be such an acknowledgment of the debt as would authorize the jury to presume a new promise. It was for a long time held in England that an acknowledgment of a debt, without a promise to pay, was not enough to deprive the defendant of the benefit of the statute: *Dickson v. Thompson*, 2 Show. 126; 2 Vent. 152. It was then adopted as a rule of evidence, that an acknowledgment of a debt was evidence only to warrant a jury in inferring a promise to pay, but was not matter, if specially found, on which the court would give judgment for the plaintiff: *Heylin v. Hastings*, Com. 54; S. C., 5 Mod. 425; S. C., Carth. 470; S. C., 1 Ld. Raym. 389; S. C., 1 Salk. 29; Bull. N. P. 148. Afterwards the courts went further, and it was held that the slightest word of acknowledgment, or writing an ambiguous and begging letter, would have the effect of taking the case out of the statute: *Quantock v. England*, 5 Burr. 2630; Cowp. 548; Peake's N. P. Cas. 93. But no case appears to have gone so far as to consider such facts as are stated in this case as having that effect. In *Lloyd v. Maund*, 2 T. R. 760, Lord Kenyon nonsuited the plaintiff, not thinking that the letter of the defendant amounted to an acknowledgment of the debt, so as to

take it out of the statute; but the other three judges thought the evidence sufficient to go to the jury; all of them, however, agreed that there must be an acknowledgment of the debt to take it out of the statute.

In *Bryan v. Horseman*, 4 East, 599, the defendant, when arrested, said: "I do not consider myself as owing Mr. Bryan a farthing, it being more than six years since I contracted. I have had the wheat, I acknowledge, and I have paid some part of it, and twenty-six pounds remains due." This was held to be sufficient to take the case out of the statute, it certainly amounted to an actual admission that part of the debt was due.

In *Clarke v. Bradshaw and Coghlan*, 3 Esp. N. P. Cas. 155; *Peters v. Brown*, 4 Id. 46, one of the defendants, Coghlan, wrote a letter within a year preceding the trial, promising to pay the demand. The other defendant after he was arrested in the suit, said that the plaintiff had paid money for him twelve or thirteen years ago; but that he had since become a bankrupt, by which he was discharged, as well by law, as from the length of time since the debt had accrued. This Lord Kenyon, before whom the cause was tried, thought was a sufficient acknowledgment to take the case out of the statute.

This was a *nisi prius* opinion on which little reliance is to be placed, and the letter written by Coghlan was abundantly sufficient to take the case out of the statute. In all the cases on the subject, it is considered that the acknowledgment of a debt, barred by the statute, is evidence to the jury of a new promise, under the replication of *assumpsit infra sex annos*. It is not reconcilable with common sense, to say that the bare admission of the execution of the notes, in this case accompanied with a declaration that the party meant to avail himself of the statute of limitations, shall be evidence of a promise to pay when the party protests against paying, and against his liability.

In the case of *Jones v. Moore*, 5 Binn. 573, *post*; the counsel for the defendant, *arguendo*, observed, that "if an acknowledgment operated by revival of the original debt, then it would answer, though accompanied by an express refusal to pay, which was contrary to the opinion of the present chief justice, in *Murray v. Tilly*, and of Judge Washington, in *Reide v. Wilkin-son*." Tilghman, C. J., in the same case, says: "When the defendant pleads *non-assumpsit infra sex annos*, and the plaintiff replies *assumpsit infra sex annos*, how can the issue be found for the plaintiff without proof of a promise, expressed or implied, within six years?" And Yeates, J., says: "Where it"

(the acknowledgment of the debt) "is accompanied by circumstances or declarations, that the party means to insist on the benefit of the statute, no promise can possibly be implied, without violating the truth of the case, and so it has been decided."

This reasoning is founded in principle, and is perfectly satisfactory. We are of opinion that the defendant is entitled to judgment.

Judgment for the defenant.

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See a parallel case, *Jones v. Moore*, *post*.

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## JACKSON v. SILL.

[11 JOHNSON, 201.]

**PAROL EVIDENCE AS TO TESTAMENTARY PROVISION.**—A testator devised:

"I give and bequeath to my beloved wife for and during her widowhood, the farm which I now occupy, together with the whole of the crops of every description, which may be thereon at the time of my death;" and after her remarriage or death, he devised the same over to another. It was held that parol evidence was inadmissible to show that the testator intended to devise the whole of his real estate at W., and which included a farm of ninety acres held by one under a lease from the testator for seven years; and further that he gave such instructions to the attorney who drew the will, there being a mistake, and not a latent ambiguity.

**EJECTMENT.** The case appears from the opinion. Verdict for the plaintiff, and motion for a new trial.

*J. Emott and Woodworth*, for the defendants.

*Henry*, *contra*.

By Court, THOMPSON, C. J. The question in this cause arises under the will of Cornelius Glen, bearing date the twenty-eighth of August, 1809. The lessors of the plaintiff claim the premises in question under the residuary devise to them in trust, for the purposes therein mentioned, and the defendant John L. Sill claims them as devisee in remainder, and as being included in the devise to Mrs. Glen, in the following words: "I give, devise, and bequeath unto my beloved wife, for and during her widowhood, the farm which I now occupy, together with the whole crops of every description which may be thereon at the time of my death, whether the same are standing or growing on the land, or have been gathered into my barns," etc. The premises in question were at the time the will was made, and also at the death of the testator, in the possession

of Henry Salisbury, under a lease bearing date the eighteenth of March, 1806, for the term of seven years; and are described as a farm, piece or parcel of land, containing about ninety acres of land, as is now in fence, and in the possession of the said party of the second part, together with the dwelling-house, barn, barrack, and other appurtenances, etc. Upon the trial, testimony was offered tending to show that the testator intended to devise the premises as a part of the farm he occupied himself, and of which he died possessed. And the question now is, whether such testimony was admissible.

I think it unnecessary to notice particularly the evidence offered; for it is obvious that, if it was competent, especially that of Mr. Van Vechten, it would have shown that the premises were intended by the testator to be devised to the defendant, Sill. The will was drawn, however, by Mr. Van Vechten, under a misapprehension of facts, and under a belief that the testator was in the actual possession of the premises. It is, therefore, a clear case of mistake, as I apprehend, and under this belief I have industriously searched for some principle that would bear me out in letting in the evidence offered; but I have searched in vain, and am satisfied the testimony cannot be admitted in a court of law, without violating the wise and salutary provisions of the statute of wills, and breaking down what have been considered great landmarks of the law on this subject.

The ground of argument assumed by the defendant's counsel was, that here was a latent ambiguity, which required explanation by extrinsic evidence. I did not understand them as going so far as to contend that if the language of the will was clear, plain and unambiguous, extrinsic evidence could be received to contradict it, or show an intention repugnant to the plain meaning of words made use of. Such a doctrine, if recognized in our courts of justice, would, indeed, be alarming. It becomes necessary then, in the first place, to inquire whether there be any ambiguity in this clause in the will. If there be none, there is no pretense for admitting the evidence offered.

The general description of the thing devised is, "the farm I now occupy." There are other parts of the clause which go to illustrate and confirm the sense in which this expression was used. The term occupy, both in a popular and legal acceptance, has a known certain and definite meaning. It would be nonsense in common parlance, to say that a man occupied a farm, which was in the tenure, possession and management, of

another; nor is the law chargeable with so much absurdity. The term, in legal acceptation, implies actual use, possession and cultivation; and that is the sense in which the term is here used is obvious; it is the farm I now occupy. The word now seems to be used emphatically, so as to leave no possible doubt as to the identity of the thing devised. But if any such doubt could exist, it is removed by the subsequent part of the clause, which gives to his wife the whole crops, of every description, which may at the testator's death be thereon. This is a relative term, referring to the land devised, and she was to have the crops, whether standing or growing on the land (devised), or gathered into the barns. The crops here devised evidently refer to those produced by his own immediate cultivation, and could not, by any possible construction, be extended to crops on a farm in the occupation of his tenant, especially, as by the terms of the lease, he was not entitled to any part of the crops, the rent reserved being payable in money. The devise of the crops therefore identifies, beyond the possibility of a doubt, the land devised.

It seemed to be admitted on the argument that if the designation of the thing devised had been, the land I now occupy, it must have been restricted to the testator's own possession; but it was said that the word farm had a more general meaning; and Plowden, 191-195, was referred to in support of the distinction. According to this authority the land occupied by the testator, and that by his tenant, were each farms, or the one as much as the other. Each had a distinct message, and lands attached to it; and there was no evidence that one message was more a chief house, in the language of Plowden, than the other. And, indeed according to the technical definition of the term farm, as here given, it would only extend to the land in the occupation of the tenant; for, says the authority, it must not only be a capital message and land attached to it, but it must have been let or demised to another; for if it has always been reserved in the hands of the inheritor thereof, it has not the name of a farm. But I presume that we are not at liberty to resort to any such subtle distinctions for rules by which to construe the meaning of this devise; for no such distinction could have been in the mind of the testator. We must understand the term farm, as used in the common popular sense, according to which the land in the possession of Salisbury was a separate and distinct farm from that occupied by the testator, and had been so used and improved for many years.

According to this view of the case there is no ambiguity in the devise which requires the aid of extrinsic evidence to render it certain; and of course I might here conclude that the testimony offered was properly overruled. It may not, however, be amiss to look a little at the light in which latent ambiguities are received, and how far they are explainable by extrinsic evidence; and here, as in many other cases, the difficulty consists more in the due and correct application of principles to the given case, than in ascertaining and defining the principles themselves. It is a general and settled distinction running through all the cases on this subject, that extrinsic evidence cannot be received to contradict, vary or add to an instrument in writing, but only to explain and elucidate it, and this only in the case of a latent ambiguity: 2 Vern. 216. "An ambiguity," says Roberts, in his treatise on Frauds, 15, "is properly latent, in the sense of the law, when the equivocality of expression, or obscurity of intention, does not arise from the words themselves, but from the ambiguous or dilettescent state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by a mere development of extraneous facts without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words made use of."

Let us apply this rule to the case before us. There was no question at the trial whether the testator was, in point of fact, in the actual possession of the premises in question at the time of making his will, or at the time of his death. The evidence on the part of the plaintiffs left no doubt on that subject. It showed conclusively that he was not in possession of any part of the premises. The evidence offered was not for the purpose of showing the actual possession of the testator, but to show that he intended to devise as well the farm leased to Salisbury, as the one which he occupied himself, and that both farms had, on some occasions, been considered and treated by him as one farm. The admission of such testimony would have been infringing upon the rule as above laid down. It would have been adding to the written language, by allowing us to say the farm in his own occupation meant also the farm in the occupation of his tenant. It would be requiring us to understand more by the phrase, "the farm I now occupy," than the ordinary or legal sense would warrant. It would be extending it to a farm in the possession of another. Nor was it competent to prove that

these farms were once united in one. Such testimony would have been altogether immaterial; for admitting the fact, it would not follow that the testator was bound always to keep them united; and the land having been used and improved for many years as two distinct farms, the phraseology of the devise is adapted to such a state of things, and shows that the testator intended to limit it to what he himself was then in possession of. Had the devise been of all his farm in Water Vliet, it would have presented a different question; it might have required some explanation as to what was his farm; but when it is qualified and restricted to the farm then in his possession, it can require or admit of no possible explanation, except showing his actual possession, which was not a point in question.

It is undoubtedly a correct rule in the construction of wills to look at the whole will, for the purpose of ascertaining the intention of the testator in any particular part, where such part is ambiguous. But where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper. It was urged on the argument that the testator, in another clause in his will, devises to his wife the lands he obtained from Stephen Van Rensselaer, adjoining his farm, and that the land obtained from S. Van Rensselaer, according to the testimony offered on the trial, did adjoin the premises in question. It is a sufficient answer to this argument to say that the same testimony showed likewise that that land did adjoin the farm in the actual occupation of the testator. This, therefore, would not falsify the description in the other devise, or be repugnant thereto; and description is never rejected when it is true in point of fact and consistent with the thing devised. But transpose this clause and connect it with the other, it would then read thus: "I give and devise to my wife, etc., the farm I now occupy, adjoining the land I purchased of Stephen Van Rensselaer." No part of this description need then be rejected; for by applying the devise to the land in the actual occupation of the testator, there would be perfect harmony and consistency between the thing or subject, and every part of the description. The incongruity would be created by applying the devise to the premises in question (which were in the possession of Salisbury). In that case some part of the description must be rejected, for the land, although adjoining that obtained of Stephen Van Rensselaer, was not occupied by the testator. Part of the description would therefore be false; so that the transposition, instead of throwing any light on the sub-

ject, would involve it in still greater obscurity. No aid can, therefore, be derived from any other part of the will, and indeed no aid is wanting, for the devise is of itself, as clear, certain and definite, as words could make it.

I have attentively examined the most of the cases cited on the argument, but cannot find any principles recognized in them to bear out the claim on the part of the defendants. I shall proceed, however, to notice those which were deemed most important, and as being very analogous to the present case. But a little attention to them will, I think, show that the analogy does not hold. In the case of *Goodtitle v. Paul*, 2 Burr. 1039, the devise was in these words, "I give and devise to my wife my farm at Bovington, in the tenure of John Smith, subject to her disposal in as full and absolute a manner as I could dispose of the same if living." The farm at Bovington had been leased by one Hammon to William and John Smith, and in the lease was this exception, "Except and always reserved out of said demise, all and all manner of wood, wood-ground, hedge-rows, timber and trees whatever, etc., with liberty of ingress and egress, to cut and carry away the same." The testator afterwards purchased the farm subject to this lease, and kept in his own hands, until his death, the excepted premises, which consisted of hedge-rows, and of chalk dells where wood had grown up after the chalk was taken away, entirely surrounded by the land in the tenure of the tenant, and also one entire wood of six acres, and the question was whether these excepted premises, so held by the testator, passed under the devise.

Lord Mansfield, in giving his opinion, lays considerable stress upon the obvious intention of the testator, throughout his will, to give to his wife all his estate; that he puts into his will all possible words that can give everything to her; and his lordship says, the words "in the tenure of John Smith" are only additional description, which will not vitiate anything sufficiently described before; that these words cannot be understood as a restriction, but only as a further description of a thing sufficiently described before. Lord M. adds, "The hedge-rows and chalk-dells themselves were actually in the tenure of John Smith; and as to the six acres of woodland, the soil as well as the trees, are excepted out of the lease. But Dr. Paul gives to his wife a power to dispose of the farm, in as full and absolute a manner as he himself could dispose of the same if living, and he himself might certainly have disposed of the soil of the six acres."

Do the facts in that case at all compare with the one before

us? There the premises in dispute were a few hedge-rows and some wood-ground, part of which was in the tenure of John Smith, and the whole of which had always passed with the farm as one entire thing; but in this case the premises in question have every quality of a distinct farm, of ninety acres of land, with the usual and necessary buildings thereon for the purposes of farming. The rule alluded to by Lord Mansfield, that *falsa demonstratio non nocet*, or, as it is expressed in Lord Bacon's Maxims, reg. 25, *veritas nominis tollit errorem demonstrationis*, cannot be applied to this case. This rule is applicable only to cases where the object of the devise or the thing devised are sufficiently certain without the demonstration or description; and it was in this sense that Lord Mansfield applied the rule; for he says the words, "in the tenure of John Smith," are only additional description to what was sufficiently described before. In such case the false description ought undoubtedly to be rejected, the certainty of the thing devised not being effected by such rejection. But in the devise before us, if the words "which I now occupy" are considered as additional description, and are stricken out, what becomes of the certainty of the thing devised? The devise will then stand thus: "I devise and bequeath unto my said wife, during her widowhood, the farm." This would be senseless and unintelligible. Had the devise been of my farm at Water Vleit, which I now occupy, there would have been some color for the application of the rule; for then, by striking out what is called the false description, there would be still some certainty left; but as the devise now stands, the words "which I now occupy" are an essential and indispensable part of the designation of the thing devised, and without them the devise would be void.

So, also, in the case of *Wroteley v. Adams*, Plowd. 191, the words "in the tenure and occupation of Roger Wilcox," were held unnecessary, because the description of the premises in the lease was sufficiently certain without them, the lease being of all their farm in Brooley, which, say the court, contains certainty in itself. In the case of *Goodright v. Pears*, 11 East, 57, the will, and the surrender of copyhold premises, which had been made by the testator, to the use of his will, being contemporaneous acts, were considered as one instrument, and the surrender was of "all his copyhold cottage, with a croft adjoining;" which croft was the premises in dispute. There, then, was certainty in the thing devised, and the additional descrip-

tion "then in his own possession" was rejected as false demonstration.

The case of *Thomas v. Thomas*, 6 T. R. 671, recognizes the rule that extrinsic evidence may be received to remove a latent ambiguity; but it was held that under this rule, parol evidence of declaration made by the testator previous to making his will, relative to his intention, were not admissible. Justice Lawrence said he thought a will could not be construed by any declarations of the testator made before the making of the will, but that his intention must be collected from the words of the will, or from what passed at the time of the making it. To what extent this latter expression was intended to be carried, I am at a loss to conceive. If to admit evidence of what passed, showing an intention contrary to the plain and obvious interpretation of the written language, I cannot give my assent to the rule. Mr. Justice Lawrence, upon the trial of that cause, received evidence, subject to the opinion of the court, on its admissibility, showing a mistake in the name inserted in the will; but the jury having found that no mistake was made, this point did not come in review before the court. The same judge, however, in his opinion at bar, seemed to think the testimony was properly admitted, and refers to cases which he said warranted the admission: 8 Vin. 312; 2 Vern. 216; but those will be found to be cases in chancery, and other cases might be cited: 3 Ves. jun. 362; 3 Bro. C. C. 446, which seem to recognize such a power in a court of chancery. Those cases, however, are principally confined to the correction of mistakes in names, and even in such cases, the power may be questionable.

Lord Hardwicke, in the case of *Goodinge v. Goodinge*, 1 Ves. 222, says: Parol evidence cannot be read to prove instructions of the testator, after the will is reduced into writing, or declarations whom he meant by the written words of the will. But I know of no case where it has been solemnly decided that a court of law has the power to correct mistakes in any written instruments, and I conclude that no such power exists. I admit the rules in their fullest extent, that a latent ambiguity may be explained by extrinsic evidence, and that if there is a certain description of the person or thing devised, and a further description is added, it is immaterial whether the superadded description be true or false. But I think I have sufficiently shown that neither of these rules, within the sense and meaning of the authorities, can have any application to the present case, because there is no ambiguity in the devise, and because by re-

jecting the words, "I now occupy," which have been called a false description, there is no certainty left as to the thing devised.

I feel the force and subscribe to the soundness of the principle which governed Lord Talbot, in the case of *Brown v. Selwyn*, *cas. temp.* Talb. 240. Although looking out of the will, my private opinion is, that it was the intention of the testator to give to his nephew, J. L. Sill, the premises in question, yet I do not feel myself at liberty to yield to the parol evidence, and make a construction against the plain words of the will. It is better to preserve consistency in legal principles, although it may not suit the equity of the individual case, than to make those principles bend to what may be thought the substantial justice of each particular case. We are accordingly of opinion that the testimony offered was properly overruled, and that the motion for a new trial must be denied.

PLATT, J., not having heard the argument, gave no opinion.

New trial refused.

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See *Doolittle v. Blakesley*, 4 Am. Dec. 218, where parol evidence was held admissible, identifying more particularly a farm, in a deed.

The principal case is cited in *Tucker v. Seamen's Aid Society*, 7 Met. 208, and in *Brown v. Saltonsall*, 3 Id. 427. In delivering the opinion of the court in the latter case, Justice Wilde says: "The only evidence which could have any tendency to prove that the testatrix had any other intention than that which the words of the devise import, was the evidence of her declarations, and that very clearly was not admissible. The case of *Jackson v. Sill*, is a very strong authority on this point, as well as on the construction of the will."

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## BAILEY v. FREEMAN.

[11 JOHNSON, 221.]

**ORIGINAL UNDERTAKING.**—Where one, by a written agreement, promises to deliver to another a certain quantity of merchandise within a certain time, and also to pay the costs on an execution issued by the latter against the former, in consideration that such execution be returned *nulla bona*, and at the same time a third person, at the bottom of the agreement, in writing guarantees the performance thereof, the guaranty is an original collateral agreement, and not a promise, to pay the previously subsisting debt of another, and is binding within the statute of frauds.

**ASSUMPSIT.** The plaintiffs having recovered judgment against one Blanche, he entered into an agreement in writing to pay them a certain amount of chocolate within six months, if they would return the execution *nulla bona* and forbear all proceed-

ing for the space of six months. At the foot of this agreement defendant wrote: "I do hereby guarantee the performance of the above, and every part thereof, on the part of Noel Blanche, to be performed at the time and to the amount therein mentioned," etc. The principal agreement and guaranty were of even date. The admission in evidence of this guaranty and agreement was objected to, and the objection overruled. It appeared that in the negotiations prior to the drawing up of the agreement, Blanche had mentioned defendant's name as the person who would act as surety. Verdict for the plaintiffs, subject to the opinion of this court.

*Baldwin*, for the plaintiffs.

*Slosson*, *contra*.

By Court, PLATT, J. The guaranty on the part of the defendant in this case, was an original collateral agreement, and not a promise to pay a previously subsisting debt of Blanche. It was part of an entire contract, consisting of the agreement signed by Blanche, and the guaranty signed by the defendant. The credit was originally given to the defendant as surety, and it was therefore unnecessary to show a separate consideration for the promise of the defendant. The principal contract and guaranty were simultaneous, and the consideration of the former supports the latter: *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317]; *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68.]

I think there is a sufficient "note or memorandum" of the whole agreement, including the consideration, stated in the written agreement, to which the guaranty refers; but if no consideration had been expressed in the written agreement, it might be shown by parol proof, because it is only necessary here to prove a consideration for the principal agreement. In the case of *Wain v. Warlters*, 5 East, 10, it was held that the consideration as well as the promise must be in writing, in order to charge one man with the debt of another. But that was upon a promise to pay an independent previously existing debt of another person, and is plainly distinguishable from this case.

New trial refused.

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The doctrine of this case is recognized and followed in many subsequent decisions in the state of New York: *Nelson v. Dubois*, 13 Johns. 177; *Rogers v. Kneeland*, 10 Wend. 250; S. C., 13 Id. 123; *Church v. Brown*, 21 N. Y. 323. So also in other places, as *Simons v. Steele*, 36 N. H. 82; *Smith v. Ide*, 3 Vt. 297; *Harwood v. Kiersted*, 20 Ill. 373; *Otto v. Jackson*, 35 Id. 360; *Nabb v. Koontz*, 17 Md. 239; *Eastman v. Bennett*, 6 Wis. 242; *Jones v. Palmer*, 1 Doug. (Mich.) 383; and in *D'Wolf v. Rabaud*, 1 Pet. 501; see *Harrison v. Sastel*, *ante*, 337.

## McCutchen v. McGahay.

[11 JOHNSON, 281.]

**HUSBAND'S LIABILITY FOR NECESSARIES.**—Where a wife leaves her husband, not by reason of her adultery, the husband cannot be held liable for necessities supplied to her, though the person who gave her credit, was ignorant of her elopement; but if she offers to return, and the husband refuses to receive her, his liability is then revived, notwithstanding a general notice not to trust her.

**CERTIORARI** from a justice's court. McCutchen brought an action of *assumpsit* against McGahay for board and lodging furnished to defendant's wife. Defendant and his wife were married in 1801; soon after and about ten years prior to this action, she left defendant without any provocation and without his consent, and has never since returned to live with him. At the time she left defendant, he published a notice in the newspaper not to trust her on his account, setting forth her departure from his bed and board. About a year before the commencement of this suit, the wife sent a person to defendant to endeavor to effect a reconciliation; but she did not go herself, nor did it appear that the person who was sent stated that he was authorized or requested by the wife to make the application. Defendant refused to take back his wife.

Verdict and judgment for the defendant.

By Court, PLATT, J. Cohabitation is evidence of the husband's assent to contracts made by his wife for necessities, and it can be repelled only by express notice of previous dissent, or notice not to trust her. If the husband turns away his wife, he gives her credit wherever she goes, and must pay for necessities for her; but if she runs away from him, though not with an adulterer, he is not liable for any of her contracts: *Herrington v. Perrot*, 2 Ld. Raym. 1006, per Holt, C. J.

In *Longworth v. Hockmore*, 12 Mod. 144; 1 Ld. Raym. 444, Lord Holt decided that, if the wife elopes, though the tradesman has no notice of the elopement, if he gives credit to the wife, even for necessities, the husband is not liable; but if the wife elopes without an adulterer and afterwards offers to return, and the husband refuses to receive her, his liability for her contracts for necessities is revived from that time, notwithstanding a general notice not to trust her: *Child v. Hardimer*, 2 Str. 875; see also *Bolton v. Prentice*, 2 Str. 1214; 3rd ed. by Nolan, and the note of the editor. In the case of *Baker v. Barney*, 8 Johns. 72 [5 Am. Dec. 326], the husband and wife parted by consent,

and the husband promised a separate maintenance, but failed to fulfill that promise; and the court held him liable on her contract for necessaries. In the present case the wife eloped without an adulterer, but she did not offer to return to her husband. Her proposition was made to the witness, and never communicated to her husband in order to a reconciliation. The plaintiff therefore is not entitled to recover.

To sustain such an action would encourage disobedience and infidelity in the wife. The duties of the wife, while cohabiting with her husband, form the consideration of his liability for her necessaries. He is bound to provide for her, in his family; and while he is guilty of no cruelty towards her, and is willing to provide her a home, and all necessaries there, he is not bound to furnish them elsewhere. All persons supplying the necessities of a married woman separate from her husband, are bound to make inquiries as to the cause and circumstances of the separation, or they give credit at their peril. The judgment below must be affirmed.

Judgment affirmed.

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## DUNHAM v. COMMERCIAL INS. CO.

[11 JOHNSON, 315.]

**WAGES AND PROVISIONS WHEN NOT IN GENERAL AVERAGE.**—A ship was insured "at and from New York to Liverpool, and at and from thence back to New York." On the voyage out she was so damaged as to be obliged at Liverpool to go into dock for repairs, where she was detained from the first of December till the following March. The cargo having been delivered and freight earned before the first of December, it was held that the wages of the master and crew and provisions were not general average, nor were the insurers liable for them.

**ADJUSTMENT OF PARTIAL LOSS.**—In estimating the amount of loss in case of repairs, the insurers are entitled to a deduction of one third new for old, without regard to the fact that the vessel was new, and on her first voyage, this being the established usage in New York.

**ACTION on a policy of insurance.** The case is stated in the opinion.

*Colden and Emmet*, for the plaintiffs.

*Wells*, contra.

By Court, THOMPSON, C. J. This was an insurance upon the ship *Orbit*, at and from New York to Liverpool, and at and from thence to a port of discharge in the United States. On the outward voyage the ship sustained considerable injury, so that, after having arrived and discharged her cargo at Liverpool, she

was obliged to go into dock to repair, and was detained for that purpose from the first of December, 1810, to the twenty-fourth of March, 1811; and the questions which arise in the case are, whether the underwriters are chargeable with the wages and provisions of the master and crew during this time; and, also, whether the underwriters are entitled to a deduction of one third new for old on the repairs of the ship, this being her first voyage.

In the case of *Leavenworth v. Delafield*, 1 Cai. 572 [2 Am. Dec. 201], wages and provisions during the detention of a vessel captured and carried in for adjudication, were considered proper expenses to be brought into general average; and in the case of *Walden v. Le Roy*, 2 Cai. 263 [2 Am. Dec. 236], the principle was extended to expenses incurred for wages and provisions during the detention of the vessel for repairs. But in these cases the expenses were incurred before the vessel had arrived at her port of discharge, and were necessary for the prosecution of the voyage; they were, therefore, incurred as well for the benefit of the cargo and freight, as for the vessel; and expenses only of this description can properly be brought into a general average. Each subject is bound to contribute, because it derives a benefit from the expenditure. A loss which does not conduce to the preservation of ship and cargo is not a proper ground for an average contribution, according to the rule as laid down by Marshall, 560, 562, and which is recognized and sanctioned by all the cases on the subject. According to this rule it is clear that the expenses for wages and provisions during the time the ship was detained at Liverpool cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had arrived at its port of discharge, and had been delivered, and freight earned, before the expenses in question were incurred; and if these expenses cannot be brought into general average, I do not see how the underwriters on the ship are to be made liable for them. No case was cited in the argument, nor is there any, I believe to be found in the books, to warrant such a charge. The insurance is upon the ship, tackle, and furniture; and the wages and provisions of the crew are no part of the thing insured. The court only look to the thing itself which is the subject of insurance: 1 T. R. 132.

The underwriters are entitled to a deduction of one third new for old. We have never recognized any rule making a distinction as to the age of the vessel; and admitting such a custom to exist at Liverpool, it cannot be presumed to have been in the

contemplation of the parties when they entered into this contract, for it could not have been known that any repairs would be necessary. The proof of a custom is admissible for the purpose of explaining the probable intention of the parties, and it is more reasonable to suppose the parties had in view our own rule on this subject than that of any other place. The rule ought to be general and uniform. The repairs might have been in a port where a different custom prevailed. If, therefore, we were to be governed by the custom of the foreign port where the repairs are made, the rule might be continually fluctuating. It is in this, as in many other cases, of more importance to have a settled rule on the subject than what the rule itself may be.

The account, therefore, between the parties must be settled on the principles here laid down; rejecting the claim for wages and provisions at Liverpool between the first of December, 1810, and the twenty-fourth of March following, and allowing to the underwriters a deduction of one third new for old on the repairs.

Judgment for the plaintiffs accordingly.

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## JACKSON v. STAATS.

[11 JOHNSON, 337.]

**CONSTRUCTION OF CLAUSE IN WILL.**—Where, after sundry devises in fee and bequests to his children exhausting the estate, the testator added, “if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children,” it was held that the devise over applied to real as well as personal property, and was not confined to the bequests of the personal estate, immediately preceding this clause. It was also held that the devise over was good as an executory devise, and carried a fee, this limitation over necessarily referring to the estate before devised.

**“CHILDREN” CONSTRUED.**—The word “children” in the above clause only applies to the testator’s children living at the time of his death, and does not include grandchildren.

**CHARGE UPON AN ESTATE.**—Charging the estate with the payment of money in the hands of the devisees, does not prevent its limitation over by way of executory devise.

**COVENANT TO STAND SEIZED.**—A deed conveying an estate in fee to the grantee, with a reservation of a life estate in the grantor, is good as a covenant to stand seized.

**EJECTMENT** for an undivided share of land, in the possession of the defendants. It appeared that Abraham Staats, the elder, died leaving a will, dated September 24, 1731, by which he

devised his farm, orchards, barns and all his goods, etc., to his wife during her widowhood. To his eldest son, Abraham, he bequeathed twelve shillings, and to four of his sons, by name, he devised four hundred acres of land; to two other sons, and their heirs, he devised "his dwelling-house, barns, orchards and all his lands, except what he had already given to his sons and daughters," to hold after his wife's decease, or re-marriage, provided they should be bound to keep and maintain their brother, Abraham, until the Lord should give him a perfect mind and memory; and also keep and maintain their unmarried brothers and sisters, provided these assist them in their labor; to each of his five daughters he devised sixty acres of land. After sundry other bequests and directions for the payment of debts, the testator devised: "I give and bequeath to Catharine and Sarah Staats, the sum of twelve pounds each, out of my personal estate, and the remainder to be equally divided among my eleven children; and if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children; and also the money of my father-in-law, J. Wendell, belongs to my wife." The premises in question were included in the lands devised to the two sons, Samuel and Joachim.

It appeared that Joachim survived all the children, and died in 1795, without issue. The defendants were the grandchildren of Johannis, the second son; and the plaintiff's lessor was the son of Isaac, the third son of the testator. Isaac died before Johannis, both having survived their elder brother, Abraham. The plaintiff founded his claim on the last clause of the will, contending that it was a good executory devise of the real as well as personal property; he also urged that, all the children being dead at the death of Joachim, and he dying without issue, the grandchildren took under the will of the testator. To show title out of Joachim at the time of his death, the defendants produced in evidence a deed from Joachim to his cousin, S. G. Van Shaick, dated July 5, 1755, in consideration of love and affection and fifty pounds, conveying the lands to the grantee in fee after the death of the grantor.

Verdict for the plaintiff, subject to the opinion of this court.

*Van Buren*, for the plaintiff.

*Vanderpool and Henry*, contra.

By Court, SPENCER, J. [After stating the facts of the case.] It is to be inferred, though this case does not expressly state it,

that all the children of Abraham Staats, the second, are dead; it is left uncertain from the case, which of the children of the testator Abraham Staats, the second, survived the others. Joachim and Johannis appear to have survived all their brothers and sisters; but the fact does not appear which of them survived the other, and this may be a very material consideration. It is stated in one of the points made by the counsel that Joachim survived all his brothers and sisters, and that fact will be taken for granted.

1. Does the devise over apply to the real and personal estate, or to the latter only? 2. Does the devise over create an estate-tail, or does it operate as an executory devise? 3. If the devise was good as an executory one, would the grandchildren of the testator take under it, as the last holder, Joachim, died without issue? 4. If the devise over created an estate-tail, was Joachim's deed, in 1755, sufficient to pass his interest?

1. We are bound to construe this will so as to carry into effect the intention of the testator, unless we are restrained by fixed and established rules of construction. In the present case there are no such rules to fetter us, and we are to look at the whole will to find out whether the testator meant to devise over his personal estate only, or both personal and real.

After several specific bequests of real and personal estate to his sons and daughters, and in fact after exhausting his real and personal estate by devises and legacies, he uses these expressions: "And if any one or more happens to die without heirs, his or their parts or shares shall be divided among the rest of the children." The only reason for confining this devise over to the personal estate is, that it immediately succeeds the devise of the remainder of the testator's personal estate to his eleven children. I know of no adjudged case, nor have I met with even a *dictum*, that a will is to be construed grammatically, or that an expression of the testator's will which reason, propriety and his evident intention, would extend to all the antecedent subjects, shall be confined to the one immediately preceding. It is impossible to conjecture why the testator should devise over such parts of his personal estate as any of his eleven children should die possessed of, without leaving an heir; and that with regard to his real estate, which, we must presume, was much more valuable, he should have no such intention. The plain and natural intention of the testator was that such parts of his estate as he had specifically devised, both real and personal, should go over to his surviving children on the contingency stated in the will.

In the case of *The Executors of Moffat v. Strong*, 10 Johns. 13, Moffat gave by his will certain specific parts of his real and personal estate to each of his sons, and directed the remainder of his movable estate to be divided among his heirs, and then added, "And if any of my sons should die without lawful issue, then let his or their part or parts be divided equally among the survivors," etc. In that case it was made a question whether the limitation applied to the *residuum* of the movable estate, or whether it extended to all the previous devises to the son or sons who should so die. It was held that the provision being general in its language and object, the words did not, by any easy or natural construction, confine the limitation over to that part of the will. The two cases are perfectly alike in this respect, and must receive the same construction.

The case of *Doe v. Stopford*, 5 East, 501, is very much in point also; there the testator made specific devises to his sons in severalty, provision for his daughter and widow, and then gave the residue of his worldly effects to be divided amongst his three sons, and lastly, "if any of his said children died under age, and without issue, the share of him or her deceased should go equally amongst his surviving sons." Lord Ellenborough, and all the judges, held that the word share in the last clause could mean only the entire fortune or portion before given. There are several other cases which might be added; but the intention of the testator, and the current of decisions, are too strong to require it. The limitation over must be applied to both the real and personal property devised. 2. The point, whether the limitation over operates as an executory devise, or to create an estate-tail, admits of very little difficulty.

The case of *Fosdick v. Cornell*, 1 Johns. 444 [3 Am. Dec. 340], is in point, that this is a good executory devise. There the words were "that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, that then the lands shall return to the survivors, to be equally divided between them." The circumstances in the two cases are very parallel; and what weighed much with the court in that case exists here; the devise was over to the surviving devisees in his will, among whom were his daughters, to whom he had devised no part of his real estate. I believe none of us have ever doubted the correctness of the decision in *Fosdick v. Cornell*, and it would be a waste of time to review the authorities there cited.

3. It has been objected that the devise over is not in fee, and

that charging the devisees, Samuel and Joachim, with the keeping and maintaining their brother Abraham, would confer a fee under the first devise. The case of *Jackson v. Merrill*, 6 Johns. 185 [5 Am. Dec. 213] settles these questions. It was there decided that charging the estate with payment of money in the hands of the devisees did not prevent its limitation over by way of executory devise; and the devise over of their parts, which in the hands of the first devisees was considered in fee, necessarily referred to the estate or interest before devised; and that the ulterior devise was clearly intended to be as extensive as the antecedent one. I cannot but think the case imperfect as to some facts. I infer, however, from the course the argument has taken, not only that Joachim survived all his brothers and sisters, but that the plaintiff seeks to recover the part of land either devised to him, or of which he became possessed as such survivor; and then, under the words of the limitation, it becomes a question whether, as the survivor, he had not a fee in the lands which accrued to him as such; and also, whether the word children shall be deemed to extend to grandchildren.

In *Wythe v. Thurlston*, Ambr. 555, by deed, an estate was directed to be sold, on failure of issue male of A., and the money to be equally divided among four persons, or the respective issue of their bodies; but if any one of them be dead at that time (the failure of issue male of A.) to be equally divided among the survivors of them and their respective children, in case any of them be dead having issue of their body.

They all four died before the contingency happened; one without issue; one had a son living; one had grandchildren, but no children; and the fourth had children, grandchildren, and great-grandchildren living. Lord Hardwicke held, that the word issue carried it to all descendants, and that the word children, in that case, which may admit of a more restrained signification, should be extended to the children, grandchildren and great-grandchildren; and they took *per stirpes*, and not *per capita*. In the case cited, it is manifest Lord Hardwicke determined it on the clear intention of the testator; that in case of a failure of issue male of A., the money was to be divided among the four persons, or the respective issue of their bodies, in case any of them were dead on the happening of the contingency; and he considered the word children as used synonymously with the words issue of their bodies. This is not an authority for saying that the word children, used as it was by the testator, meant grandchildren.

The next case relied on is *Gale v. Bennet*, Ambr. 681. That case was governed by the case of *Wythe v. Thurlston*; and grandchildren were admitted to inherit, because the testator meant to let in the grandchildren, by using the word issue as synonymous with children. The next case is *Crooke and Wife v. Brooking*, 2 Vern. 106. R. Mallock gave to trustees fifteen hundred pounds, for such uses as he had declared to them, and by them not to be disclosed. One of them, by letter to the other, mentioned the trust, which was, that they, out of the profits, should allow Anne Crew a maintenance during her husband's life-time, and if he died before her, then she was to have the money; but if her husband survived, the money to go amongst her sister's children, as she should advise. Anne Crew died in her husband's life-time, leaving only one sister, Grace; but gave no directions or advice relative to the fifteen hundred pounds. Grace had only one child (the plaintiff) living at the death of Anne Crew, but had five children living at the death of the testator, Mallock, some of whom had children, who were parties to the suit; and the questions were, whether the plaintiff, being the only child living of Grace, at Anne Crew's death, should have the whole fifteen hundred pounds; or whether the administrators of the dead children, or the grandchildren, the children of the deceased children, should have a share? Chancellor Jeffries decreed the money to be divided between the child living at the death of Anne Crew, and the children's children living at the death of Anne Crew. Upon a rehearing before the lord's commissioners, they decreed for the plaintiff, and were "clear of opinion, that where the devise is to children, the grandchildren cannot come in to take with the children;" but all admitted, that if there had been no child, the grandchildren might have taken by the devise to the children.

The next case is that of *Clarke v. Blake*, 2 Bro. 320. The testator devised the premises in question "to the use of such child or children of his brother, H. C., whether male or female, as should be living at the time of his said brother's death, as tenants in common." The question was whether Bridget, one of the children, being unborn, but *in ventre sa mère* at the time of the testator's death, should take a share, or be excluded. Lord Kenyon, then master of the rolls, held that the child *in ventre sa mère*, could not take under a bequest to children living at the time of the testator's brother's death. The Lord Chancellor Thurlow expressed an inclination the other way, but made no decision.

The case of *Crook v. Brooking* concludes with an observation of the reporter, which, if correct and authoritative, as it is not, does not apply to this case; "but all admitted that if there had been no child, the grandchildren might have taken by the devise to his children." Sir Thomas Reynolds, in delivering his opinion in *Stead v. Burrier*, T. Raym. 411, says the word son is never taken for grandson, no more than child is taken for grandchild; and in *Brown v. Keys*, Cro. Eliz. 358, all the court resolved, that where the devise was to one of Richard Foster's children, his child's child should not have it, for that it was out of the words. To the same purpose, are 10 Mod. 376; Owen, 88; Ventris, 229, 230. The testator in making the limitation over, never contemplated the case which has occurred, and when he says, "if any one or more happens to die without heirs, his or their parts or shares shall be equally divided among the rest of the children," he, undoubtedly, by the rest of the children, refers to his own children, whom he had before named in his will. He died not once thinking of his grandchildren; and it would be doing violence to his intention to say he did. If this be so, then the last surviving child, whether he had issue or not, would retain, not only his share in the first devise, but also the shares which had accrued to him; for the estate devised to him was vested by the devise, and if no one could take under the executory devise, it would become inoperative, and could not divest him of what he had gained by the direct devise. It is, therefore, incorrect to suppose that if there was no one to take under the executory devise, the estate would revert to the right heirs of the testator. It is contended that the deed from Joachim Staats to S. P. Van Shaick was void, as it was to take effect *in futuro*, and that the lessor is one of the heirs of Joachim. This is a very mistaken idea; and the cases of *Doe v. Simpson*, and of *Roe v. Freeman*, 2 Wils. 22 and 75, are directly in point, that this deed is good as a covenant to stand seized. The same point was adjudged in Massachusetts, 4 Mass. 136 [3 Am. Dec. 210], and expressly in *Jackson v. Dunsbagh*, 1 Johns. Cas. 91. We are of opinion that the defendants must have judgment.

VAN NESS, J., concurred in the opinion, that the defendants were entitled to judgment on the third point stated by Mr. Justice Spencer, and declined giving any opinion on the other points in the case.

Judgment for the defendants.

## WHITBECK v. VAN NESS.

[11 JOHNSON, 409.]

**RECEIVING NOTE IN PAYMENT.**—If a vendor of goods at the time of sale receive from the purchaser the note of a third person (such note not being forged, and there being no fraud on the part of the purchaser), such note will be deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved.

**ASSUMPSIT** to recover the price of a horse sold by plaintiff to defendant. It appeared that defendant had agreed to purchase the horse, if plaintiff would take the note of one Deane payable in six months with interest; that plaintiff accepted the offer and delivered the horse to defendant, who sent Deane's note to Whitbeck. Nothing was said at the time of the delivery as to the solvency of Deane, or at whose risk the note was to be taken. The note not being paid, this action was brought. The chief justice charged the jury that the plaintiff was entitled to recover, unless he had expressly agreed to take the note in payment.

Verdict for the plaintiff; and motion for a new trial.

*Van Buren*, for the defendant.

*E. Williams*, *contra*.

By Court, SPENCER, J. The single point for our determination of this case is, whether the note of a third person, agreed to be taken in payment for goods sold at the same time, is taken at the risk of the vendor of the goods, or of the vendee. I put out of consideration the allegation of fraud, for it was not proved; and I also lay aside the plaintiff's allegations that the defendant had promised to indorse the note, as there was no proof of that fact.

The plaintiff relies on the decision of this court, in *Johnson v. Weed*, 9 Johns. 310 [*ante*, 279]. I am compelled to say that, although I assented to that decision, and yet believe it to be correct, the reasoning of the judge who gave the opinion went further than I intended; and, as I understand those of my brethren who assented to the decision, further than they meant to go. In that case there was a contrariety in the evidence. The defendant's proof went to show that it was part of the bargain that Townsend's note should be taken in payment for the goods; whilst the evidence of the plaintiff showed that they were to be paid for in cash; and that when Townsend's note, made payable to the plaintiff, was produced, the plaintiff

observed it ought to have been made payable to and indorsed by the defendant; to which one of the defendants replied, "it was late in the evening, and his vessel was ready to go to Albany, and that it would make no difference." A new trial was properly refused in that case, because it was evident that the plaintiff did not intend to take Townsend's note at his own risk; nor could such have been the intention of the defendants, unless indeed they had a fraudulent design, which we were not authorized to suppose.

Here the facts are entirely different; and nothing can be more manifest than that both parties perfectly understood that the plaintiff should take Deane's note at his own hazard. The case of *Johnson v. Weed* renders it necessary to review the various cases in the English courts, and in our own, that we may be perfectly understood. In *Clark v. Mundell*, 1 Salk. 124, and 12 Mod. 203, Lord Holt held that if A. sells goods to B., and B. is to give a bill in satisfaction, B. is discharged, though the bill is never paid, for the bill is payment, but otherwise a bill should never discharge a precedent debt or contract. In *Bank of England v. Newman*, 1 Ld. Raym. 442, and 12 Mod. 241, Lord Holt ruled, "that if a man has a bill payable to him, or bearer, and he delivers it over for money received, without indorsement, this is a plain sale of the bill; and he who sells it does not become a new security;" otherwise if had indorsed it. This decision of Lord Holt is cited by Chief Justice Lee, in *Hartop v. Hoare*, 3 Atk. 50, with approbation. In *Ward v. Evans*, 2 Ld. Raym. 928, Lord Holt reiterates the doctrine that taking a bill for goods sold is a payment, because it was part of the original contract; but that paper is no payment where there is a precedent debt. In 12 Mod. 408 and 517, he again asserts the same doctrine. In *Fyddell v. Clark*, 1 Esp. Cas. 448, Lord Kenyon held that if a man, in the discount of notes, takes bills without indorsement, he must be considered as having taken the risk of payment on himself, and that, by not indorsing them, the defendant refused to pledge their credit, and the person receiving the bills took them on their own credit only.

The statute of Anne 5, 7, has interposed to regulate and fix the result of taking bills for a pre-existing debt. It provides that the acceptance of bills for a former debt shall be a complete payment, unless due diligence is used to obtain payment, and the bill be protested. In the very recent case of *Emly v. Lye*, 15 East, 12, Bayley, J., observes: "If a person buy goods of another, who agrees to receive a certain bill in payment, the

buyer's name not being upon it, and that bill be afterwards dishonored, the person who took it cannot recover the price of his goods from the buyer, for the bill is considered as a satisfaction." It has been supposed that the cases in 2 Ld. Raym. 929, 930; 1 Salk. 124; 7 T. R. 66; 3 Johns. Cas. 72; and 6 Cranch. 264, contain contrary principles. The cases from Ld. Raym. and Salk. have already been commented on. The case from 7 T. R. (*Owenson v. Morse*), on examination, will be found to turn on the right to stop goods *in transitu*. Owenson purchased from Morse some plate, and paid for it in the notes of a third person. Morse retained the plate, to have Owenson's arms engraved at Morse's expense. In the *interim*, the maker of the notes failed; and on refusal to deliver the plate, Owenson brought trover, and failed; the court holding that the bargain was not so perfected but that the seller might stop the goods *in transitu*.

In *Roget v. Merrit and Clapp*, 2 Cai. 120, we adopted the same principle, that in an executory contract, the consideration having failed, the vendor had a right to withhold a delivery of the goods. The case in 3 Johns. Cas. 72, turned entirely upon the effect of accepting a note for a precedent debt, and was decided in strict conformity to Lord Holt's distinction. The case of *Shuby v. Mandeville*, 6 Cranch, 264, proceeds wholly on the effect of a creditor's taking a note from one of two joint-debtors, and prosecuting it to judgment; and on his right afterwards, to maintain a suit against both, notwithstanding his judgment against one. That case contains no principle applicable to the one before us.

In *Tobey v. Barber*, 5 Johns 68 [4 Am. Dec. 326], the principle that taking a third person's note for a pre-existing debt is not payment, unless so expressly agreed, is again recognized and enforced. In *Wilson v. Foree*, 6 Johns. 110 [5 Am. Dec. 195], a horse and chair were sold for a third person's note, and it was received in full satisfaction; but it appearing that the defendant knew that the third person was insolvent, but had represented him to the plaintiff as a man of property, we held, that as the basis of every contract was good faith, taking the note under fraudulent misrepresentation was no payment.

In the case of *Markle v. Hatfield*, 2 Johns. 459 [3 Am. Dec. 466], a counterfeit bank-bill was taken in payment; and we held that the payee did not assume upon himself the risk of forgery; the forged note being received upon the faith of its being genuine; but it is not to be doubted, that had the bill been good,

and had the bank failed, and the parties been equally ignorant of the fact, that the decision would have been different. These are all the cases referred to, which are supposed to countenance the opinion, that the defendant is liable for the price of the horse sold to him, and it appears to me, that they are perfectly reconcilable with the various decisions of Lord Holt.

The intrinsic circumstances of this case plainly show, that the plaintiff considered himself as taking Deane's note at his own risk. It was made payable to the plaintiff himself, and the defendant, by not indorsing it, or guaranteeing the payment, clearly declined pledging his own responsibility. The offer was made by the defendant's agent of Deane's note for the horse; the plaintiff took time to consider whether it was advisable to take Deane's note, and after deliberation, and we must presume, too, after inquiry, agreed to sell the horse for the note. It appears to me, we should be perverting the manifest agreement of the parties, if we were to pronounce that the plaintiff did not take the note at his own hazard. To my mind, the nature and proof of this transaction furnish us decisive proof that the plaintiff was to take the note at his own peril, as if it had been stipulated in express terms. There must be a new trial, with costs, to abide the event of the suit.

New trial granted.

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The doctrine in New York in regard to the taking of a note of a third person in payment of a debt is stated in *Noel v. Murray*, 13 N. Y. 167, where it is laid down that where there is a precedent debt, taking a note of a third person, will not be presumed a payment thereof unless there be an agreement to this effect, and the *onus* is on the debtor to prove this; but where the note is given contemporaneously with the creation of the debt, the presumption is that it was received in payment, unless there be an agreement to the contrary, and in this case the *onus* is on the creditor.

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## BEARDSLEY v. ROOT.

[11 JOHNSON, 464.]

**PURCHASE BY ATTORNEY.**—An attorney, by his general authority as such, cannot purchase land sold under an execution in favor of his client, either in trust or for the benefit of such client.

**ACTION FOR MONEY HAD AND RECEIVED.**—An action for money had and received cannot, in general, be supported unless the defendant has in fact received money. But where an attorney or agent has discharged a debt due to his principal, and applied that debt to the payment of a debt which he himself owed to his principal debtor, the amount of the debt which he has so discharged may be recovered in this form of action. So where an attorney issued execution on a judgment recovered by his

client, and became himself the purchaser of the land sold under the execution, and paid for the same by discharging the judgment against the defendant, it was held that his client might maintain this action against him.

ACTION for money had and received, to recover the amount of a judgment collected by the defendant as the attorney of the plaintiff's testator. It appeared that at a sheriff's sale of a farm belonging to Elijah Beardsley under several executions, including that of the plaintiff's testator for twelve hundred dollars and costs, the defendant became the purchaser for one thousand and twenty-seven dollars. The sheriff executed a deed to defendant, who paid the sheriff the amount of the prior executions, and received from E. Beardsley a receipt for the balance of the amount bid. Defendant's bid exceeded the amount of all the prior executions; and one Hasbrouck offered to give within one dollar of that amount at the time of the sale. Defendant gave E. Beardsley a discharge in full upon the executions against him, but received no money therefor. A verdict was taken for the plaintiff for the amount levied upon the testator's judgment, with interest, subject to the opinion of this court.

*Sherwood*, for the plaintiffs.

*Woodworth*, *contra*, urged that the defendant acted as the testator's agent in the purchase; that if the defendant was liable at all it must be in an action on the case, not in this form of action, it not appearing that any money had come to the defendant's hands: *Nightingale v. Devisme*, 5 Burr. 2589; *Tuttle v. Mayo*, 7 Johns. 132.

By Court, VAN NESS, J. It may be true that the defendant intended to purchase the farm mentioned in the case, for his client; though, judging from the facts before us, it would rather seem that he bought it on his own account. The fact of taking the deed directly to himself, and not to his client, affords a more clear indication of his real intention at the time of the sale, than his declarations made before and after. But admitting that he meant to make the purchase in behalf of his principal, still, having no authority from him for that purpose, he cannot compel him or his representatives to accept of it. It is not pretended that his employer gave him any express authority or direction to make the purchase for him, and no such authority was derived from his retainer to collect the debt due from Elijah Beardsley. Admitting, however, for a moment that an attorney may be justified in making a purchase in behalf of his

client, when such a measure is indispensably necessary to save or secure his debt; yet this is not even a case of that description. On the sale of the farm, Hasbrouck offered to give within one dollar of the sum for which it was struck off to the defendant; and it is admitted by the case that the price for which the farm was sold, exceeded the amount of all the executions in the sheriff's hands; so that there was not the least necessity for the defendant to become a purchaser in order to secure his client's demand. If the defendant was authorized to make this purchase on account of his principal, then the latter was bound to accept it according to the terms upon which it was made. By these terms the defendant stipulated to pay the amount due to Hasbrouck upon his judgment, which he has actually done; and Phineas Beardsley consequently became liable to reimburse the defendant the money thus paid. To permit an attorney, in this way, to make his client his debtor, might frequently lead to the most injurious consequences. Many clients, instead of recovering and receiving their money according to the ordinary course of proceeding, would unexpectedly find themselves involved in intricate and extravagant speculations, to the management of which they might be totally incompetent, and which in the end might prove ruinous.

The defendant could not make himself a trustee for his principal against his will, and throw upon his hands a purchase which his interest did not require him to make. Suppose the farm had turned out to be worth one half the sum which the defendant gave for it, would Phineas Beardsley have been obliged to take it? If Phineas Beardsley had ratified the purchase by some positive unequivocal act, such as reimbursing the defendant the money paid to Hasbrouck, or agreeing to do so, he would have been bound to abide by it, however disadvantageous it might have proved. But so far from assenting to the purchase, it appears, from the defendant's own testimony, that soon after the sale, when the defendant offered him the sheriff's deed, he declined to accept it, and at the same time told the defendant he was already embarrassed on account of Elijah Beardsley, and preferred he should sell the farm.

It follows from what I have said, that the defendant is to be considered as a purchaser in his own right, and for his own benefit, and not as trustee for Phineas Beardsley; and if this be true, the remaining question in this case may be easily disposed of. The general rule indisputably is, that the action for money had and received cannot be supported, unless the de-

fendant has actually received money. It has, however, been held in the English courts, that taking negotiable paper is equivalent to the receipt of money; and although we have never sanctioned that doctrine by an express decision, yet in the case of *Cumming v. Hackley*, 8 Johns. 206, the court seemed to intimate their approbation of it. But the present case stands upon different grounds. Here the attorney or agent has discharged a debt due to his principal, and applied that debt to the payment and satisfaction of his own debt; for the amount of which he is liable to the plaintiff in this form of action, and so it has been frequently decided.

In the case of *Scott v. Surman*, Willes, 400, the plaintiffs assigned to the bankrupt as their factor, a quantity of tar, which he sold before his bankruptcy, and it was agreed that the tar should be paid for in promissory notes, payable in four months after the delivery of the tar, and that a debt of thirty-one pounds, due from the factor to the vendees, on his own account, should be deducted. The suit was brought to recover this sum of thirty-one pounds, as well as other moneys in the hands of the defendant. The court held, that this thirty-one pounds stood just on the same footing as if the factor had received that sum in money, before his bankruptcy from the vendees; and that the plaintiffs must come in as creditors under the factor's commission. The same principle was adopted by the court in deciding one of the points in the case of *Ward v. Evans*, 2 Ld. Raym. 928.

But the case of *Floyd v. Day*, 3 Mass. 403 [3 Am. Dec. 171], is perhaps more fully in point, and I will, therefore, state it a little more at large. Floyd, the plaintiff, having a demand upon one Pilsbury, appointed the defendant, Day, her agent, to recover for her a sum of money, in satisfaction of her demand. The defendant commenced a suit against Pilsbury, and the matter was then compromised by Pilsbury's agreeing to give three hundred dollars for a discharge from the plaintiff's demand in full. For this sum the defendant instead of money, took Pilsbury's note payable to himself, and discharged Pilsbury as he was authorized to do by the plaintiff; so that she had no remedy, except against the defendant. Upon this state of facts, the court decided, that the plaintiff could not maintain trover for the note; but that the defendant having, instead of money, received the note of Pilsbury, and discharged him, the property of the note was in the defendant, and he became immediately answerable to the plaintiff for the amount as for "so much money received by him for her use; and an action of

*assumpsit* was her proper remedy. For although the defendant received no money, yet by his transaction he discharged Pilsbury from the plaintiff's demand on him for money, and he must be considered as having made himself answerable to her for the money he ought to have received of Pilsbury."

To these cases may be added that of *Denton v. Livingston*, 9 Johns. 96 [*ante*, 264], which was decided in conformity with the doctrine laid down in the preceding cases; the reasons assigned by the court, in the decision of the first point, to which I particularly refer, will be found strictly applicable to this cause. If the sheriff had demanded and received the money for which the land was sold, from the defendant, on the execution of the deed to him, there is no question he would have been perfectly justifiable in immediately paying it back again to him, and, in that case, it is not disputed that this suit might have been supported. The sheriff, however, instead of going through the useless ceremony of first receiving the money from the defendant with one hand, and paying it back with the other, at once accomplished the same thing, by taking from him a receipt in full satisfaction of the execution. This negotiation was the same as money to the defendant. He paid his own debt with his client's judgment, and he cannot be allowed to say that no money came into his hands.

If the defendant had been duly authorized by his principal to purchase the land in trust for him, and had, when required, refused to execute the trust, I agree that the action for money had and received could not be maintained. The fact that purchase was not thus made, distinguishes this case from those cited by the defendant's counsel, in which it has been held that this action would not lie. In consequence of the discharge given to the sheriff, the plaintiff can never again resort to his judgment against Elijah Beardsley to obtain satisfaction of his demand. The defendant has had the benefit of that judgment as effectually as if he had received the money upon it, and then made use of it in the payment of any other debt he may have contracted. Suppose Hasbrouck had, in fact, become the purchaser, for the sum he offered for the farm (which it appears was enough to pay his own judgment, as well as that of Phinehas Beardsley), and the defendant, instead of receiving the money from him, and due to his client, had consented that Hasbrouck should set off a debt which he happened to hold against him for an equal amount, surely in that case the defendant would not be permitted to say that no money had come into his hands.

I do not mean to question the authority of the cases relied upon by the defendant's counsel. The present case depends upon different principles, and is distinguishable in many respects, as will be seen by a summary consideration of some of them. Let us take for instance the case of *Longchamp v. Kenny*, Doug. 136, and suppose the plaintiff, instead of the evidence he gave in that case, had shown that he delivered the masquerade ticket to Kenny, the defendant, to sell, and to pay over the money to the plaintiff, and that Kenny had sold the ticket to some person to whom he was indebted, in a sum equal to the value of the ticket, and instead of receiving the money had paid his debt with it, and taken a receipt in full. I think upon such a state of facts (which would make that and the present case analogous), the plaintiff's right to recover upon the count for money had and received would have been perfectly clear. Again take the case of *Nightingal v. Devisme*, 5 Burr. 2589, and suppose the defendant, Devisme, on the same day he received the stock had paid a debt he owed with it, and taken a discharge of the debt (which would also have made that case like the present), I think there would have been no question, but the action for money had and received would have been sustained. While the ticket in the first case (putting out of view the facts from which the court presumed that Kenny actually received the money for the ticket), and the stock in the other, remained in the hands of the respective defendants, they were properly held not to be liable as for money had and received; but add to these cases the facts which I have stated, and the result no doubt would have been entirely different. We are of opinion, therefore, that the plaintiffs are entitled to judgment.

SPENCER, J., not having heard the argument, gave no opinion. Judgment for the plaintiffs.

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The authority of this case is extensively recognized in our courts, showing when the action for money had or received will lie against attorneys or agents. It is thus followed in *Van Nostrand v. Reed*, 1 Wend. 430; *Every v. Edgerton*, 7 Id. 262; *Gilchrist v. Cunningham*, 8 Id. 644; *Rodman v. Hedden*, 10 Id. 501; *Stafford v. Richardson*, 15 Id. 305; *Rundle v. Allison*, 34 N. Y. 182; *Allen v. Brown*, 44 Id. 233; *Hart v. Ayres*, 9 Ohio, 7; *Matthewston v. Powder Works*, 44 N. H. 292; *Wheat v. Norris*, 13 Id. 180; *Hathaway v. Burr*, 21 Me. 570; *Chapman v. Burt*, 77 Ill. 342; *Peay v. Briggs*, 22 Ark. 71.

As to an attorney's power, the case is relied on in *Steward v. Biddlecum*, 2 N. Y. 106, and *Foster v. Wiley*, 27 Mich. 247.

## JUDSON v. WASS.

[11 JOHNSON, 525.]

**FAILURE TO CONVEY TITLE.**—Where by the conditions of the contract the purchaser is required to deposit part of the purchase-money, and the vendor is unable to convey a good title, pursuant to the articles, the purchaser may disaffirm the contract, and recover back his deposit.

**INCUMBRANCES.**—Where the contract provided that the conveyance was to be with warranty, except as to an incumbrance specified therein, the existence of an unsatisfied mortgage at the time the vendor should have conveyed and although such mortgage was recorded, was held to exonerate the purchaser.

**ASSUMPSIT** to recover damages for the breach of an agreement for the purchase of certain land. It appeared that the land was sold at auction to the defendant who had subscribed to the terms of the sale, which were: one fifth of the purchase-money within seventy-five hours from sale, and a bond and mortgage of the premises for the balance; the plaintiff and his wife after such payment to execute and acknowledge a deed with warranty, except as to certain quitrents specified; the deed, bond and mortgage to bear even date with the day of sale; for non-compliance with the terms of sale, the purchaser to pay at plaintiff's option, either one hundred dollars, or the deficiency arising from a resale. The defendant gave in evidence, a mortgage of the premises previously existing in favor of one Fonda at and prior to the time of the sale. This mortgage had been recorded.

[The record is incomplete, it not appearing how the case was determined in the lower court, nor under what circumstances it was removed to this court.]

*A. Van Vechten*, for the defendant.

*A. Townsend*, contra.

By Court, VAN NESS, J. There can be no question that the giving of the note, deed, bond and mortgage, were all to be simultaneous acts. This is the fair construction of the conditions of sale, taking them altogether; and many of the cases that have been cited fully support this construction. Even if it were otherwise, as the plaintiff was not in a situation to convey a title, according to the terms of the sale, the defendant was not bound to carry into effect any of the stipulations on his part. It is now well settled that where by the conditions of the sale, the vendee is required to deposit part of the purchase-money, and the vendor is unable to convey a good title, pursuant to the articles, the vendee may disaffirm the contract, and recover back his deposit. In every sale like the present there is a condition

that the purchaser shall not be bound to part with his money, unless the seller is able to give him a title according to the terms of the sale. The reason and policy upon which this doctrine is founded, are too well known to need repetition, and an inflexible adherence to it affords the only effectual protection against fraud and imposition upon purchasers at public auction. By the conditions of sale in this case, the plaintiff stipulated to execute a deed with covenant of warranty, subject to the quitrents on such of the lots as should be designated at the time of the sale. This means not merely that he will execute a deed containing such a covenant, but that he has the power to give a deed which would carry with it an indefeasible title to the lots, subject to no other incumbrance or charge than that specified in the conditions: *Clute v. Robinson*, 2 Johns. 613. Such a deed the plaintiff was not able to give. The property, at the time of the sale, and even down to the time of trial, was under a mortgage to Fonda, for a large sum of money. It is said that this mortgage, being registered, the plaintiff must have purchased with full notice of its existence. The question is not whether he knew of the mortgage, but whether by terms of the sale he is bound to pay for the lots with this incumbrance upon them. If it were possible to entertain a doubt on this question, it would be removed by the consideration that the conditions specify the quitrents as the only incumbrance to which the property was subject. I say the only incumbrance, because the very mention of the quitrents excludes the idea that there was any other. In every view of this case it is clearly against the plaintiff, and there must be judgment for the defendant.

Judgment for the defendant.

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## RUNYAN v. MERSEREAU.

[11 JOHNSON, 534.]

**INTERESTS OF MORTGAGOR AND MORTGAGEE.**—At law, as in equity, a mortgage is regarded merely as a security, and the mortgagee has but a chattel interest. The freehold is in the mortgagor.

**TRESPASS, RIGHT TO MAINTAIN.**—The mortgagor, or the purchaser, or assignee of the equity of redemption, may maintain trespass against the mortgagee or a person acting under his license.

**ASSIGNMENT OF MORTGAGE.**—A mortgage may be assigned by mere delivery, without writing.

**TRESPASS *quare clausum fregit*.** The plaintiff was in possession of the *locus in quo*, and had purchased the equity of redemption

thereof, under a judgment issued in his behalf against one Leonard. The latter had previously mortgaged the land to Mersereau, under whom the defendant entered and cut timber. The question was as to who had the freehold, the mortgagee or the plaintiff, the purchaser under the mortgage.

*H. Bleeker*, for the plaintiff.

*Vander Lyn*, *contra*, cited *Jackson v. Hull*, 10 Johns. 481; *Rob. on Frauds*, 271; *Johnson v. Hart*, 3 Johns. Cas. 326.

By COURT. This was an action of trespass *quare clausum fregit*. The plaintiff proved himself in possession of the *locus in quo*, and showed a title derived under a judgment against one James Leonard, who, it appeared, had mortgaged the land to Joshua Mersereau. By the pleadings, the question presented to the court is, whether the freehold was in the plaintiff, who had purchased the equity of redemption under the judgment against the mortgagor, or in Joshua Mersereau, the mortgagee. Courts of law, both here and in England, have gone very far towards, if not the full length of, considering mortgages, at law as in equity, mere securities for money, and the mortgagee as having only a chattel interest. Lord Mansfield, Doug. 610, says a mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security; that it is an affront to common sense to say the mortgagor is not the real owner. Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. Mortgages will pass by a will not made with the solemnities of the statute of frauds. The assignment of the debt, or forgiving it even by parol, draws the land after it as a consequence. The debt is considered the principal, and the land as an incident only. The interest of the mortgagee cannot be sold under execution. It is unnecessary to go into an examination of the cases on this subject; they have been repeatedly reviewed by this court: 3 Johns. Cases, 429; 1 Id. 590; 4 Id. 42. The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he, of course, is entitled to judgment.

Judgment for the plaintiff.

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Showing that an assignment may be made by a mere delivery of the mortgage, this case is relied on in *Fryer v. Rockefeller*, 63 N. Y. 276. As to the nature of the respective interests of mortgagor and mortgagee, it is cited in *Mason v. Lord*, 40 N. Y. 485; but the law on this point is well settled.

CASES  
IN THE  
SUPREME COURT  
OF  
PENNSYLVANIA.

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MARTIN v. SMITH.

(5 BUNNEY, 16.)

**TENANCY IN COMMON UNDER PROVISION IN WILL.**—A testator, after a devise of the surplus of his estate to his four sons, made the following bequest: "ITEM.—I will that one third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children." This was held a tenancy in common in the two daughters, and the children of the third, and not a joint-tenancy.

**RULE DETERMINING JOINT-TENANCY.**—Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint-tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intention that the estate should be divided, it then becomes a tenancy in common.

**ERROR** to the court of common pleas. Smith, the defendant in error, brought an action of account render under the statute, as the administrator of his wife, daughter of one Robertson, against the plaintiffs in error, the executors of Robertson. The question in the case arose upon the construction of a devise in the testator's will, which appears from the opinion.

*Elder and Hopkins*, for the plaintiffs in error, cited: 2 Bl. Com. 181; *Lady Shore v. Billingsly*, 1 Vern. 482; *Webster v. Webster*, 2 P. Wms. 347; *Cray v. Willis*, Id. 529; *Willing v. Baine*, 3 Id. 115; *Earl of Sussex v. Temple*, 1 Ld. Raym. 310; *Aylor v. Chep*, Cro., Jac. 259.

*Duncan*, contra.

**TILGHMAN, C. J.** The first question in this case arises on the will of William Robertson. The testator in the first place gives

legacies of different amounts to his ten children, after which he expresses himself as follows: "Item.—I will that if any of my legatees die without natural heir, that my bequeathments return into my family to whom they please; and further, I allow my personal estate, either by vendue or otherwise, and then what ready money is made, and likewise what bonds or notes is taken and made, shall be equally divided amongst my legatees by equal proportions at the discretion of my executors; and further, I allow that my estate, personal or real, shall overmount these my bequeathments, that then the overplus shall fall to my four sons whom I now name: William, David and Joseph Robertson, two thirds. Item.—I will that one third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children."

It plainly appears, from the whole will, that the testator was an ignorant and illiterate man. Whether the devise to his three daughters was in joint-tenancy or tenancy in common, is the point to be decided. When a man is providing for his children, by his will, nothing can be more unnatural than an estate in joint-tenancy. It is with good reason, therefore, that courts of justice have long been disposed to lay hold of slight expressions, in order to make a tenancy in common. I confess that I feel this disposition in my own mind, but it shall never influence me so far as to shake the established rules of property.

Where an estate is given to several persons jointly, without any expressions indicating an intention that it should be divided among them, it must be construed as a joint-tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intent that the estate should be divided, it then becomes a tenancy in common. The counsel for the defendants in error have relied on that part of the will in which it is said that if any of the legatees die without natural heir, the bequeathment should return to the testator's family, to whom they please; that is to say, the legatee dying without issue might devise it to any of the family he pleased. If this provision could be applied to the subsequent devises, it would certainly afford sufficient ground for saying that there could be no joint-tenancy, because there would be an evident intent to take away the right of survivorship; but I agree with the counsel for the plaintiffs in error, who apply these expressions to the prior devises. That is the plainest and most natural construction. The defendants in error say in the next place, that at all

events the surplus of the personal estate, after paying debts and legacies, was to be equally divided; but there again I differ from them. The testator's meaning, to be sure, is not very clearly expressed, but I am satisfied he intended that the legacies he had given in the first part of his will should be paid partly in cash and partly in notes or bonds, in equal proportions, at the discretion of his executors; because he speaks of a sale of his personal property at vendue, and of bonds or notes being taken. This accords with the common custom of the country, which is to make sale of the property of deceased persons at auction, and receive payment part in cash and part in bonds or notes on a short credit.

It is clear that the testator did not intend to give the whole surplus of his personal estate to be equally divided among all his children, because immediately after the devise, which is supposed to contain such a disposition, he declares his belief that there would be a surplus, which would overmount his prior bequeathments, and proceeds to dispose of that surplus, whether personal or real, not among all his children, but among part of them. There is a considerable inaccuracy in the devise to his sons. The expressions are, to my four sons whom I now name; and yet he goes on to name but three only. It is said to have been decided formerly by two judges of this court, that the three sons took as joint-tenants. That question not being now before us, I throw it altogether out of consideration, except so far as it may fairly be viewed as shedding light on the devise to the daughters. In that respect I do not think it of weight, as the devise to the daughters contains certain expressions, which cannot by any reasonable construction be controlled by the preceding devise. The testator gives one third of the surplus to his three daughters, naming them; but declares that Mary Crosher's part shall go, not to her, but to her children; this explanation makes the devise not to his daughter Mary, but immediately to her children.

Both the expressions, and the intent of the devise, are inconsistent with a joint estate. In joint-tenancy there are no parts. All have an undivided interest in the whole. The moment you introduce the idea of separation, the fabric of joint-tenancy is dissolved. Any intimation by the testator of a division or a severalty of interests, is sufficient to make a tenancy in common. Now what must have been the intent in the present instance? It would be absurd to suppose the testator knew anything about the legal import of his words; but it is clear he did not intend

to give an equal right of survivorship, between his daughters Margaret and Elizabeth, and the children of his daughter Mary. The children of Mary were to take among them one third of a third of the surplus; but Margaret and Elizabeth were to have each one third of a third. Consequently if one of the children of Mary died, the interest of that one would go to his surviving brothers and sisters, to the exclusion of his aunts Margaret and Elizabeth. Thus the share belonging to the children of Mary must be considered as detached from the shares of their aunts, and this is to all intents and purposes a tenancy in common.

But it has been urged, that whatever may be the case as to the children of Mary, there will be a joint-tenancy between Margaret and Elizabeth, because there is no intimation of several interests between them. To this argument I cannot accede. The joint-tenancy, if it exists at all, is created by the same devise which must be applied to all the devisees. There is no color for contending that the testator meant to create a joint-tenancy between Margaret and Elizabeth only, and to give a separate interest to the children of Mary. On the contrary, the fair conclusion is, that if there was a severalty as to one, there was a severalty as to the others. In other words, that this remaining third part of the surplus was to be divided into three parts, one of which was to go to Margaret, one to Elizabeth and one to the children of Mary. Whether those children took their portions in joint-tenancy, or in common between themselves, I give no opinion. I am clear that it was the testator's intent to divide the surplus in the manner I have mentioned, and that his expressions will warrant us in construing the will accordingly.

There remains to be considered the objection to the declaration in this cause. The suit is founded on an act of assembly, by which an action of account render is given to a residuary legatee. We are bound to support the judgment if possible, because the cause has been tried on its merits, and the legislature have shown great anxiety to overrule exceptions founded on matters of form, in the sixth section of the act "to regulate arbitrations and proceedings in courts of justice," passed the twenty-first of March, 1806: 4 Smith's Laws, 329. It appears by the declaration that the summons was issued against John Martin and Daniel Robertson, executors of William Robertson, deceased, and the process having been served on Martin only, the suit was carried on against him alone.

This is according to the long-established practice of our courts. The declaration sets forth that the defendant and the

other executor, who was not summoned, were the bailiffs and receivers for the said Elizabeth Smith of the real and personal estate of the said William Robertson, and received of the money of that estate three hundred pounds, etc. Perhaps the case might have been set out with more clearness, but enough is shown to bring it within the act of assembly, on which the action is founded. It was contended by the counsel for the plaintiffs in error that the conclusion was wrong, laying the injury "to the damage of the said John Smith," without adding "as executor of the said Elizabeth Smith." This objection has no weight. In actions brought by executors or administrators, the usual conclusion is to the damage of the plaintiff without saying more.

I am of opinion that the judgment should be affirmed.

YEATES, J. William Robertson, after devising his real estate, and bequeathing divers specific and pecuniary legacies, uses the following words in his will: "I allow that my estate personal or real shall overmount these my bequeathments; that then the overplus shall fall to my four sons, whom I now name, William, David, and Joseph Robertson, two thirds. Item.—I will that one third of the overplus to my three daughters, Margaret Carnahan and Elizabeth Smith and Mary Crosher, her part of that third to her children."

Elizabeth Smith died after her father, before his executors had settled their administration account; and the first question is, whether her share survived to her sister Margaret and the children of her sister Mary, or whether it vested in her husband John Smith, who had since taken out letters of administration on her estate?

There is no doubt but that there may be joint-tenants of personalties; as where a horse is given to two, they are joint-tenants. But if one sells his share to another, this severs the joint-tenancy, and the vendee and the other person are tenants in common, and no survivorship: Lit., s. 282, 321; 1 Vern. 482; 2 W. Bl. 399. But joint undertakings in the way of trade or the like, are not liable to survivorship: 1 Vern. 217; 1 Ch. R. 81; 2 Fonb. 106.

The properties of a joint-estate are derived from its unity, which is fourfold, of interest, title, time and possession: 2 Bl. Com. 180. Joint-tenants are said to be seised *per my et per tout*, by the half or moiety, and by all; that is, they, each of them, have the entire possession, as well of every parcel as of

the whole. They have not one of them a seisin of one half or moiety, and the other of the other moiety; neither can one exclusively be seised of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety: Ib. 182; Lit., s. 288; 5 Co. 10.

Joint-tenancies were formerly favored at law, because they were against the division of tenures; but as tenures are, many of them, taken away, and in a great measure abolished, that reason ceases, and courts of law now incline against them as much as is done in equity. They are a kind of estate that does not make provision for posterity. Chancery will decree in favor of a tenancy in common as much as it can. If, indeed, there are no words that will point at a tentancy in common, the rule of survivorship in a joint-devise must take place; but a joint-tenancy will never be inferred where a testator meant division. Hence it is that in wills the words "equally to be divided" make a tenancy in common according to the intent of the deviser, although they never make any partition *in facto*, for his intent appears, that it shall be divided, and by consequence that there shall be no survivor: 3 Co. 39 b. So the word "equally" alone, without other words: 3 Atk. 733. So of the word "alike:" Cowp. 357, determined in 1775. And so also in other cases, where the word "among" or "between" has been used. It is laid down that the expressions, "share and share alike," have been held these two hundred years to create a tenancy in common: by Parker, Justice, 2 Atk. 122.

The inaccuracy of language, as well as orthography, of the will under consideration, clearly mark the drawer of it to be an illiterate person; but the intention of the testator as to the matter in controversy can readily be collected. When he "devised to his three daughters, Margaret Carnahan, Elizabeth Smith and Mary Crosher, her part of that third to her children," one third of the surplus of his estate, he evidently points to a division between them. These words are synonymous to the expressions I have already cited, which have been held to create a tenancy in common. Part is the contrary of whole; and Margaret, Elizabeth and Mary's children (representing the mother) cannot be said to hold an undivided third part of the whole, when an undivided ninth part is plainly given to those children. I am, therefore, of opinion that Elizabeth did not take in joint-tenancy under the true meaning of the will.

The plaintiff below had a good cause of action against the executors under the act of assembly "for the more easy re-

covery of legacies," passed the twenty-first of March, 1772: 1 Dall. St. Laws, 631. The latter were individually bound to render an account to the former, and personally responsible to him, to the extent of the money received for him in right of his wife. This case is not analogous to those cases wherein it has been held that an executor cannot be charged as such, either for money had and received by him, money lent to him, or on an account stated of money due from him as such, these charges making him personally liable; nor to those other cases wherein such counts have been joined to other counts in assumpsit against executors, on promises made by the testator. When a balance is found due by auditors in account render, they are liable personally to that amount to the legatee.

After a trial on the merits, the party comes too late to question the declaration for informality, but advantage should have been taken hereof by demurrer. I do not, however, see such defect in point of form, according to our usual method of declaring, where one of the defendants has not been taken or summoned on the original process. Here, Martin was returned to be served with the summons, but Robertson was not to be found, and the declaration recited these facts specially, and proceeds against Martin alone. Mr. Elder appeared and pleaded that he was not the bailiff or receiver of Elizabeth Smith, and issue was joined thereupon. The defendant afterwards added that he had fully accounted, upon which issue was also joined. Upon trial, the jury found for the plaintiffs seventy-nine pounds, seventeen shillings and two pence, on which judgment was entered. Whether any agreement took place between the counsel, which justifies the jury in finding a precise sum, or whether that sum was to be settled by auditors, remains to be determined upon our view of the original paper, which is referred to in the record before us.

BRACKENRIDGE, J., gave no opinion, having been prevented by sickness from being present at the argument.

Judgment affirmed.

## REICHART v. CASTATOR.

[5 BIRNEY, 100.]

**GRANTOR'S DECLARATIONS AS AGAINST GRANTEE.**—Declarations made by the grantor at the time of executing a deed that he only did it for a sham, so that the people could not come at it, are no evidence, if made in the absence of the grantee, unless a ground is previously laid by showing a trust, or his participation in the fraud.

**DEED IN FRAUD OF CREDITORS.**—A deed made to defeat and defraud creditors is void as against creditors; but not as against the grantor himself, or his children.

**ERROR** to the court of common pleas. Castator and others, representing the daughters of Henry Reichart, brought an action of ejectment against his son George, who claimed by virtue of a deed from father to son, purporting to be in consideration of expenses incurred by the latter for his father, and the support of his mother. The plaintiffs produced in evidence, against defendant's objection, the deposition of Mary Reichart, the defendant's mother, and widow of Henry Reichart, deceased, setting forth that the deed was executed while the grantor was in prison, and that he told deponent that he only did it for sham, so that people could not come at the property. A verdict was given for the plaintiffs, and the questions reserved were: whether the deposition was properly admitted, and whether the deed was good against the grantor's daughters, although void as to creditors.

*Duncan*, for the plaintiff in error.

*Huston and Watts, contra*, as to the first point cited *Dinkle v. Marshall*, 3 Binn. 587; *Hutchins v. Lee*, 1 Atk. 447; *Willis v. Willis*, 2 Id. 71; *Young v. Peachy*, Id. 254; *Gregory v. Setter*, 1 Dall. 193; *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 372]. As to the second point, counsel cited 1 Bac. Ab. 112, Agreements, B. 2.

**TILGHMAN, C. J.** In this case there is a bill of exceptions to the admission of Mary Reichart's deposition as evidence, and also an exception to the opinion of the court on the evidence, in their charge to the jury. Before the deposition was offered, Reichart, the defendant below, had given in evidence a deed from his father, Henry Reichart, to himself for the land in dispute. The deed was expressed to be made in consideration of sundry debts paid by the son for the father, and in consideration that the son had, for a long time, supported his father's wife, and also of five shillings paid by the son to the father.

The deposition went to prove that at the time of the execution of the deed, the grantor declared "he did it only for a sham, so that the people could not come at his land." It does not appear that the grantee was present at the time of this declaration, or in any manner assenting to it, so that I cannot conceive any principle of law under which it was admissible. The question is not (as the counsel treated it in the argument) whether parol evidence might be admitted to show a fraud, or a secret trust, but whether *ex parte* declarations of the grantor were evidence to contradict his deed. There is no occasion to say whether such declarations might be admitted as supplementary evidence, a ground having been laid by previous testimony tending to show a trust, for the case on the record stands on the naked, unsupported deposition. Under these circumstances, I am clearly of opinion that it was not evidence. In considering the judge's charge, it appears that the whole evidence is not set forth in the record; for in stating the facts, he mentions that Henry Reichart was in jail, and had suspicions that his property would be forfeited to the commonwealth. There is nothing of this in Mary Reichart's deposition. She only says that her husband was in jail, and declared that he made the conveyance to prevent the people from coming at his land. I should rather understand from this, that he meant to defraud his creditors; or, perhaps, if he was charged with felony, those persons who, on his conviction, would be entitled to restitution of their stolen property, and may be considered in the light of creditors. It is impossible to form a satisfactory opinion on the case as it really stood before the court of common pleas, because we are left to guess at it. But, taking it on the deposition, which is the only evidence on the record, it appears that Henry Reichart made a conveyance to his son, with an intention of defrauding some persons who had just claims on his property. That being the case, the deed would be void as to the persons intended to be defrauded, but good against himself and his daughters claiming under him. The judge was mistaken in his opinion, when he placed the daughters on the footing of creditors. Creditors have a legal right to take the property of their debtor in execution; and any conveyance made to defeat them is void, not only by statute, but at common law. But children have no such right. What they receive from their father is his bounty, and he has the undoubted right of disinheriting them, either by deed or will. The judge concluded his charge by telling the jury that if they believed the deposition of Mary

Reichart, as he did, their verdict should be for the plaintiffs. In this he was wrong; for it is only proved by that deposition that the grantor declared the conveyance to be intended by him as a sham, etc., but not that the grantee considered it as a sham.

Now if a man makes a voluntary conveyance to his son, and delivers to him the deed and possession of the land, the conveyance cannot be avoided, either by the father or the other children claiming under him, whatever may have been the secret intention of the father, uncommunicated to the son. Upon the whole of this record, I am of opinion that there is error both in the admission of the deposition of Mary Reichart, and in the charge of the court. The judgment must, therefore, be reversed and a *venire facias de novo* be awarded.

YEATES, J. The law, on principles of general policy, will not permit the grantor of lands to invalidate his own conveyance by declarations subsequently made, nor will it suffer a man to make evidence for himself. The assertions of a vendor of lands in the presence of his vendee have been received in evidence, on the grounds contained in the maxim of "*qui tacet, consentire videtur.*" It is true, where reasonable grounds have been previously laid before the court, to induce a belief that a fraud has been committed to the injury of third persons, testimony is admissible of the declarations of either of the parties to such fraud in the absence of the other party, in like manner as is done in charges of conspiracy. Applying these rules to the case before the court, it not appearing that George Reichart was present when Henry Reichart made the declarations detailed in the deposition of Mary Reichart, nor any circumstances shown, which would evince a meditated fraud on others, before the paper was offered in evidence, I am of opinion that the same was improperly received.

If the object of the parties to the deed in controversy was really to establish a trust for the benefit of the father and his family, unaccompanied with any intention of defrauding others, a court of equity would grant relief against the defendant who unconscientiously refused to execute that trust by claiming the lands for his own benefit. But I am not aware of any decision wherein equity has interposed in favor of the parties to the fraud. I see not, however, anything in this case, which would justify me in considering the conveyance as a mere trust, nor what purpose it could possibly answer in the family, in that point of view. It was considered in the charge of the court be-

low, "that as the deed would be void against creditors, so ought it to be void against his female children, whom it is impossible to suppose the father intended to defraud. Next to the claim of creditors, the claim of nature is to be regarded." From hence it was inferred that the plaintiffs, the daughters of Henry Reichart, did not stand in the same situation as their father. To this system of reasoning I cannot subscribe.

It is not explicitly stated in the charge, what was the cause of Henry Reichart's confinement. It is barely mentioned that he was in jail, and under the suspicion that his property would be sacrificed, in some way or other, to the state; and he then seems to have determined to cheat the commonwealth, whom he erroneously supposed would be entitled to his landed property. It has been said during this argument, that he was committed on suspicion of felony or burglary, and broke jail before trial. I do not see that we can take notice thereof, unless that fact appears on the record before us, though most probably some such matter was admitted upon the trial, which gave rise to the observations made by the court. Under the thirtieth section of the act of the thirty-first of May, 1718, the persons entitled to the restitution of stolen goods, on a conviction of larceny, may take out execution against the lands and chattels of an offender, and levy the amount thereof. And under the ninth section of the act of the twenty-third of September, 1791, the same remedy is given, on a conviction of robbery or burglary, to the owners of the goods stolen, and the residue of the lands and chattels of the offender is forfeited to the commonwealth. Upon a conviction, therefore, of either of these offenses, the owners of the stolen goods might lawfully proceed against the lands of the offenders; and, in cases of robbery or burglary, there would be a forfeiture to the state. A conveyance made to elude those provisions would be fraudulent and void at common law as well as under the statute of 13 Elizabeth, which was made in affirmance thereof, as to the parties intended to be injured thereby.

The question then before us is reduced to one single point on this part of the case; do the daughters of Henry Reichart stand in a different situation from their father as to this deed? The deed, however fraudulent as to creditors, as to him is valid and binding; and neither courts of law nor equity would relieve him against his own iniquity, voluntarily practiced. His daughters claim under and through him; and, however innocent and unoffending they must be considered of the trick intended by their father, cannot in a legal sense be deemed his cred-

itors. His crime will be visited on them, and the law points out to them no mode of redress which was not open to their father. Hence, I conceive that the charge of the court was erroneous in this, that the plaintiffs below stood in a different situation from their father as to the deed under consideration.

I am of opinion that the judgment of the court of common pleas be reversed, and a *venire facias de novo* awarded.

BRACKENRIDGE, J., absent on account of illness.

Judgment reversed.

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As to a deed in fraud of creditors, being, however, good as against the grantor, this case is relied in *Eyrick v. Hetrick*, 13 Pa. St. 491; *Buehler v. Gloninger*, 2 Watts, 227; *Sickman v. Lapsley*, 13 Serg. & R., 225; *Killinger v. Reidenhauer*, 6 Id. 535.

Noticing the doctrine of the case, it is thus stated in 2 Wharton on Evidence, sec. 1167: "To infect a grantee or vendee, however, with his grantor's or vendor's fraud, it is necessary that he should be privy to the fraud, and hence the grantor's declarations as to the transaction being fraudulent on his part, are not admissible against the grantee, unless there be proof of collusion *aliunde*."

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## BILLINGTON v. WELSH.

[5 BERRY, 129.]

**SALE OF LAND BY PAROL—NOTICE.**—A parol sale of land, where the consideration is paid and possession delivered, is good as between the parties; but to make it valid as to a *bona fide* purchaser, there must be clear evidence of notice to him, either actual or legal. Legal notice exists only where there is a violent presumption of actual notice.

**LEGAL NOTICE.**—Undisturbed possession by the equitable owner has generally been considered legal notice; but it must be a clear, unequivocal possession. Accordingly, where A. bought by parol from B. a corner of B.'s tract, paid for it, was put into possession, and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to a certainty, and on B.'s own part there was a forge, dwelling-house, grist and saw-mill, and other buildings, which, together with A.'s buildings, might be taken as one establishment, the possession of A. was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against B.

**EJECTMENT.** The case appears from the opinion. Verdict for the plaintiff, and the cause removed to this court by consent.

*Huston and Watts*, for the plaintiff.

*Burnside and Duncan*, contra.

**TILGHMAN, C. J.** The plaintiff was a purchaser at the sheriff's sale, by virtue of an execution levied on a tract of land belong-

ing to Daniel Turner. The defendant claims under Turner by a parol agreement accompanied with possession. Although our act of assembly requires all contracts concerning land to be reduced to writing, yet under the decisions which have been made, there can be no doubt but that where the contract has been executed and carried into effect by payment of a valuable consideration and delivery of possession, the contract is binding between the parties. But where a third person is to be affected the case is more difficult. In order to bind him, something must be shown which makes it inequitable to break the parol contract. The defendant undertakes to show that the plaintiff purchased with notice of the contract; and if so, it would certainly be against equity that he should recover in this suit. But it behooves a person who stands on a defense of this kind, to make out a clear case.

No actual notice has been proved; but it is contended that the possession of the defendant was notice in law. These legal notices, being sometimes contrary to the fact, are confined to cases in which violent presumption of actual notice arises. The undisturbed possession of land has generally been considered as legal notice, because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possessor. But to entitle the bare possession to such weight it ought to be a clear, unequivocal possession.

Let us examine what kind of possession has been proved in the present case. The defendant is the brother-in-law of Daniel Turner, and lived at the time of the sheriff's sale, and for a considerable time before, on one corner of Turner's tract. Turner had erected a forge, grist-mill and saw-mill, with all those small buildings which are connected with works of that kind. It is well known that in such cases the workmen frequently occupy houses with small portions of land annexed to them. And when a person throws his eye over a forge and mills, and the adjacent buildings and inclosures, it naturally occurs to him that they all belong to the proprietor of the works. The defendant has been guilty of extraordinary negligence; for not only has he omitted to survey and mark the bounds of his claim, but he has given no decided evidence of boundary. His contract was to have fifty acres of land somewhere about his house; but whether he was to cross the stream and include the land on both sides, so as to have the command of the water, was not proved. Now this is a most important circumstance. For if

he has the command of the water, which it is said he claims, he may exercise it in such a manner as to do material injury to the iron-works erected by Turner. The defendant's claim is principally woodland, consequently the knowledge of his possession is so much the more difficult.

Under all these circumstances it would be going too far to say that such a possession is notice to all the world. How could any man reasonably suppose that Turner's brother-in-law, occupying a small parcel of land at no great distance from the iron-works, had good title, not only to the land on which his house and fences stood, but also to the water, to such a degree as to deprive Turner of the right of using the stream to the full extent that his works might require? There is another circumstance unfavorable to the defendant. Connected as he was with Turner, it can hardly be imagined that he was ignorant of the judgment against him, and it became his duty to make known to the world this secret title to part of the land which passed for Turner's. It does not appear that he made any publication on this subject. Not having done so, it seems to me that he acted at his peril, and that he has no right to complain if his title is impeached by persons who had no actual notice of it. Perhaps in another ejectment he may make a stronger case. But, on the evidence produced at this trial, I think the judge was right in advising the jury to find for the plaintiff. I am, therefore, against granting a new trial.

YEATES, J. [after stating the case]: It was admitted that Welsh gave no notice of his equitable title to the sheriff at the time of the levy or at either of the sales; though it was proved by four witnesses that the sales intended to be had were known in the neighborhood of the land. I thought it reasonable to presume, and so instructed the jury, that the defendant Welsh knew of what was going forward, and that he ought to have given notice of his claim to the sheriff and warned all persons against purchasing, if he really knew of the intended sales. Failing herein, a legal fraud would be imputed to him. This presumption was founded on the notoriety of the premises being taken in execution, and of the intended sales under the sheriff's advertisements; on the delay to sell till above two years after both judgments; on one sale being set aside; and on the defendant's living on good terms with his brother-in-law on the same tract of land, and who could not therefore be supposed ignorant of his embarrassments.

But it was strenuously contended on the part of the defendant,

that his actual possession of the lands, and carrying on a distillery, was constructive notice to a purchaser at the sheriff's sale, and that he was bound to examine into that fact before he bought. No law cases were produced on this point, and my mind was unsettled on the subject. I well recollected that a trustee in possession of the estate, conveying for a valuable consideration without notice, the purchaser would have the estate against the *cestui que trust*; but not so if the latter was in possession at the time: 2 Fonb. 170; 2 Bl. Com. 337. But how far the law obtained as to constructive notices in general cases, or whether it would extend to a case circumstanced like the present, I was not prepared to assert. I therefore advise that the point should be reserved for further consideration. This the plaintiff's counsel acquiesced in, but the defendant's counsel refused to agree thereto. The jury found a verdict for the plaintiff, subject to the court's opinion on the question of law, considered as a reserved point; and it was agreed by mutual consent, that the argument should be carried into banc, to be there proceeded in, as fully as it might be done in the circuit court on the notes of the trial. I have had sufficient time to consider the question, which is merely of a legal nature, whether upon the facts disclosed on the trial, there was implied notice to the sheriff's vendee of the defendant's equitable title.

Constructive notice is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. If a man confesses notice that the estate at law was in a third person at the time when he purchased, he is bound to take notice of what the trust is: 2 Freem. 137, pl. 171. It has been determined that a purchaser being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease that tenant had which was a surprise upon him: 2 Ves. jun. 440. It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted, that he could not transfer the ownership and possession at the same time, that there were interests as to the extents and terms of which it was his duty to inquire. But notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title: Sugd. Law of Vend. 499. And a purchaser *bona fide* and without notice cannot be affected by the mere circumstance of the vendor being out of possession for many years.

Thus in *Arwith v. Plummer*, 3 Bac. Ab. 644, first ed. Mortgage E., s. 3, where A. covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made, and A. thirteen years afterwards surrendered the same lands to B. for valuable consideration, without notice of the covenant, B. was held to be entitled to the lands, and the covenantees were left to their remedy at law. This authority, which is marked with approbation by Sugden in the page already cited, goes the full length of deciding the present question. It is of peculiar importance that notice should be given at sheriff's sales of adverse claims; and the observation of Lord Commissioner Rawlinson, 2 Vern. 159, that "equity has always been careful not to impeach purchasers by presumptive notice," holds with appropriate force, where lands have been sold by process of law. The interests of debtors, creditors and purchasers are all involved in the principle. Here no notice whatever was given of the defendant's claim. The advertisement was of three hundred acres, more or less, in Patton township, with a forge, grist and saw-mill thereon, and the lands were so conveyed by the sheriff. A tract of two hundred and thirty-four acres, twenty-seven perches, was surveyed to Turner under his warrant for two hundred acres, on which he dwelt and made valuable improvements; and it is now sought to reduce the quantity sold to one hundred and thirty-four acres twenty-seven perches, and to affect the right of the purchaser as to the water of Spring creek, which is indispensably necessary to the carrying on of his manufactories. At best the possession of the defendant was of a mixed nature. His pretensions were not defined by marked boundaries or an actual survey. If one inclining to purchase had previously viewed the premises, he would have seen nothing but what usually occurs, where forges, grist and saw-mills are carried on, out-houses and cabins for the accommodation of colliers and other workmen. Without such conveniences, those manufactories could not be carried on. The defendant's holding under such circumstances could not convey the same information, nor put a purchaser upon inquiry in the same manner as an exclusive, unmixed possession in common cases might reasonably seem to give. In every view which I have been able to take of the case I am of opinion that judgment should be rendered for the plaintiff on the verdict.

BRACKENRIDGE, J., being unwell, gave no opinion.

Judgment for plaintiff.

In *Meehan v. Williams*, 48 Pa. St. 240, the authority of this case is recognized, showing that to constitute legal notice there must be clear, unequivocal possession; and to the same effect it is cited in *Martin v. Jackson*, 27 Pa. St. 508; *Garrard v. Pittsburgh*, 29 Id. 158; *Wickes v. Lake*, 25 Wis. 96; *Tuttle v. Jackson*, 6 Wend. 226; *Smith v. Yule*, 31 Cal. 184. In *Warren v. Sweet*, 31 N. H. 342, it is cited showing that one is bound to inquire, when another is in the open possession of land conveyed.

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## STULTZ v. DICKEY.

[5 BINNEY, 285.]

**EVIDENCE OF CUSTOM.**—In trespass for cutting and carrying away his grain, a lessee for years may give evidence that by the custom of the country he is entitled to the way-going crop, though he does not specially plead such custom, and though he held under a written lease, making no reference to such right. A custom generally known is to be considered as entering into every contract to which it applies.

**RIGHT OF TENANT TO MAINTAIN TRESPASS.**—A tenant entitled to the way-going crop, who enters and warns a third person against cutting it, may maintain trespass *quare clausum fregit* against the wrong-doer, notwithstanding he had previously to the trespass given up to his landlord possession of the farm in a part of which the crop was growing.

**TRESPASS *quare clausum fregit*.** Plaintiff proved that he obtained an assignment of a lease for five years, dated April 1, 1799, from Montgomery to Stockton. It appeared that in 1802, Montgomery sold the premises to defendant. In opposition to defendant's warning, plaintiff, prior to the expiration of his lease, sowed part of the land in rye, and a remaining portion was sown in wheat by Miller, an under lessee of Stultz. After the expiration of the lease, and possession surrendered to defendant, Stultz entered at the harvest season, and told defendant not to cut the grain. Defendant did cut and carry away the rye and the wheat; for both of which injuries plaintiff claimed damages. Evidence of the custom of the country that a tenant for a term was entitled to the way-going crops was received, against defendant's objection that the same was inadmissible, such custom not having been alleged in the declaration, and being in opposition to the written lease. Verdict for the plaintiff for both injuries, pursuant to the instructions of the judge.

A motion for a new trial being denied, the defendant appealed

*Watts and J. Riddle*, for the appellant.

*Dunlop and Duncan*, contra.

TILGHMAN, C. J. [after stating the facts]: On the trial several points of law arose which were decided by Judge Smith, before whom the trial was held, but reserved for the opinion of this court: 1. The defendant's counsel objected to the admission of evidence to prove the custom of Pennsylvania by which the tenant was entitled to the "way-going crops," that is, the crop of grain sown by the tenant during the lease and coming to maturity after its expiration; 2. It was contended on the part of the defendant that the action of trespass *quare clausum fregit* did not lie, even if the tenant was entitled to the crop; 3. It was also contended on the part of the defendant that at all events the plaintiff ought not to recover for that part of the crop which grew on the land leased to John Miller.

On all these points the court decided in favor of the plaintiff.

1. Where the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted. Both parties are supposed to know it, and to be bound by it, unless provision to the contrary is made in the contract. It appears to me, therefore, that it was proper to admit evidence of the custom concerning the "way-going crop." I understand that this custom had been recognized by a decision at *nisi prius* previous to this action, and that the law had been held as it is laid down in the case of *Wigglesworth v. Dallison*, Doug. 190. There the custom was limited to a particular part of England. With us it is supposed to extend throughout the state. In the nature of the thing it is reasonable that where a lease commences in the spring of one year, and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop. If the parties intend otherwise, it is easy to control the custom by an express provision in the lease.

2. The distinction is nice between those cases in which trespass *quare clausum fregit* does or does not lie. On a consideration of the cases, I take the law to be, that where one is entitled to the exclusive profits, or crop growing on land, he may support trespass *quare clausum fregit*. Such right is equivalent to a right of possession. It is said in Co. Lit. 4, that the grantee of the vesture or herbage of land may support trespass *quare clausum fregit*. So where one has the exclusive right of digging ore in a certain place: *Harper v. Burbeck*, 1 Bl. 482. The same principle was decided in *Wilson v. Mackreth*, 8 Burr. 1824, the

last decision in the English courts before our revolution. That was trespass *quare clausum fregit*, brought by one who was entitled to the exclusive right of cutting, digging and carrying away turfs in a certain place. The court were clearly of opinion that the action lay. In the case before us, the tenant had the exclusive right to the crop, while it was growing, and until it was ripe, cut and carried away. If it be objected that he had given up the possession of the plantation on the expiration of the lease, it may be answered that he still retained the right to the crop, and this right was reduced to actual possession by his entry at the time of harvest. I am of opinion, therefore, that the action may be supported.

3. As to that part of the land leased by Stultz to John Miller, the action does not lie, because Miller was entitled to the crop, and consequently to the possession. It was a field of about twenty acres, for which Miller was to pay a rent of fifteen pounds. It was urged by the counsel for the plaintiff that damages ought to be given for this field for a loss consequential to the trespass, because Stultz would have to answer to Miller for the loss of his grain. But consequential damages cannot be recovered, unless there was a trespass; take away the trespass, and the consequential damages are also taken away. Now, here there was no trespass, because the plaintiff was not entitled either to the crop or the possession of the land on which it grew. I am clearly of opinion that damages ought not to have been given for Miller's grain, and so the judge ought to have directed the jury. The judgment must therefore be reversed, and a *venire facias de novo* be awarded.

YEATES, J. The present appeal naturally divides itself into three questions: 1. Is a tenant for a term entitled to his way-going crop, without special provision for that purpose in his lease? 2. Can such tenant maintain trespass *quare clausum fregit* against his landlord, who has cut and carried away such crop after the tenant has surrendered to him the possession of the premises? 3. Ought a new trial to be granted under the circumstances of this case?

1. I take the first question to have been fully put to rest by the decision of the court at Lancaster *nisi prius*, in June, 1782, between Michael Diffendorfer and others, plaintiffs, and John Jones, defendant. There the agents of forfeited estates had leased to the defendant the lands of Michael Whitman, an attainted traitor, for one year from May, 1778, till May, 1779, at a certain rent, and the lease was continued for a second year,

ending the first of May, 1780. The agents, under the order of the supreme executive counsel, sold the lands to the plaintiffs in August, 1779, and for the wheat and rye put in during the fall of that year, and reaped in the following year, the replevin was brought. Several witnesses, including two of the jurors, were examined as to the custom of the country, that tenants for years, who did not receive crops at the commencement of their leases, were entitled to take off the crops which had been sown during the continuance of their leases. The court were clearly of opinion that the defendant was entitled to the crop which he had put in during his lease, and the jury found accordingly. Though I was dissatisfied with the opinion then delivered, I have never heard the doctrine questioned since I have adverted to this case in *Carson v. Blazer et al.*, reported in 2 Binn. 487 [4 Am. Dec. 463]. Such custom is said in our books not to alter or contradict the agreement in the lease, but only to superadd a right, which is consequential to the taking, although not mentioned therein. There can be no doubt, if the tenant was restricted, by the terms of his lease, from removing the grain after his time was expired, that he would be bound by his contract; and I apprehend the privilege of the tenant in general is confined to a reasonable quantity of the lands in proportion to the residue thereof, according to the course and usage of husbandry in the same parts of the country. The privilege is founded on the highest equity, and conduces to the extension of agriculture.

2. It is admitted that an interest in the soil is not necessary to support an action of trespass. It is sufficient if the party has an interest in the profits. But all the books agree, that a plaintiff, in order to maintain trespass on lands, must have an entire actual or at least constructive possession in himself. A general property, in the case of real estate, is not, as in the case of personal, sufficient to support this action: 1 Johns. 512. It appeared fully, in the course of the trial, that the plaintiff, previous to the cause of action accruing, had surrendered up the possession of the demised premises to the defendant, reserving his right to this crop, and had removed to other lands. It has been contended that these lands could not with any propriety be called the close of the former, and that he could not support trespass for breaking it; that trespass is founded on the possession only. Case lies by the reversioner, and trespass by the tenant in possession, for the same trespass: *Biddlesford v. Onslow*, 8 Lev. 209. Trespass *quare clausum fregit* will not lie by grantee of the ear grass for breaking of his close, but tres-

pass will lie for spoiling of the grass: *Hitchcock v. Harvey*, 2 Leon. 213; see, also, 1 Ld. Raym. 739.

The case of *Charles Torrence v. Joseph Irwin*, determined at Chambersburgh in April, 1797, was cited by the defendant's counsel, but the facts were not stated. There the plaintiff, being entitled to certain lands in Peters township, leased them to Joseph Grubb for two years under certain rents, but restricted his lessee from cutting green timber. The lease was continued by successive assignments, and the tenant was in possession when the trespass was committed. The landlord brought trespass for breaking and entering his close, and cutting down and carrying away his trees, and on the trial an objection was made to the form of action. Smith, justice, and myself decided at *nisi prius* that the suit could not be maintained, and a verdict passed for the defendant. A new trial was afterwards moved for in banc, on the ground of a supposed error in our opinions, which came on to be argued in December term following; but the court unanimously rejected the motion. I frankly admit that my opinion as to the form of action has been changed since the first argument. I had at first conceived, that if the law was considered as a science, and the boundaries of actions adhered to, the form of action had been misconceived; and that the plaintiff should have brought a simple action of trespass for the taking and carrying away the grain, or trover and conversion, or replevin, in either of which modes he would have had a full and complete remedy.

Upon advertng to the circumstances of this case as disclosed in evidence, we find that the plaintiff's lease expired on the first of April, 1803, and that he paid to the defendant sixty pounds his full year's rent, on the eighth of that month. He quitted the premises and left his way-going crop standing in the ground, which he claimed as his right at the time under the settled custom of the country. This he was desirous of reaping, but was prevented by the defendant, who put in his hands and cut and carried away the same, except about ten acres, which, as John Dickey, the son of the defendant, swore, were supposed to have been taken away by the plaintiff in the clouds of the night. Here, then, the plaintiff had an exclusive right to the possession of the grain, which he had sown in peace, and to enter upon the land whereon it was growing, and cut it down and remove it for his own benefit. He actually entered for that purpose, and was disturbed and prevented from exercising that right, except as to a small part thereof, by the unlawful acts of the defendant.

Here, also, was a possession, which would maintain trespass, *quare clausum fregit*.

In *Wilson v. Mackreth*, 3 Burr. 1824, it was adjudged that trespass *quare clausum fregit* would lie for digging and carrying away the plaintiff's turf and peat, although he had no ownership in the land. And in *Clap v. Draper*, 4 Mass. 266 [3 Am. Dec. 215], it was determined, on full argument, that under a grant to one, his heirs and assigns, of all the trees and timber standing in a particular close, forever, with liberty to cut and carry them away at pleasure, an estate of inheritance passed thereby to the grantee, and that he might support trespass for breaking his close, against the owner of the soil, for cutting down the trees. The reason given by the chief justice applies to the case immediately before us; which is that he had a separate interest in the soil for a particular purpose, although the right of soil was not in him; and when injured in the enjoyment of his particular use of the soil, he might maintain trespass for breaking his close; but not if his interest had been in common with others. So such action would lie for him as had the herbage, although not a right to the soil; but it would be otherwise if he was entitled to a portion of the herbage for a particular part of the year, in which case he could only maintain trespass for spoiling his grass, and not trespass for breaking and entering his close.

The principle upon which these cases were decided seems fully established at law, and receives confirmation from *Fbote v. Colvin*, 3 Johns. 216 [3 Am. Dec. 478], that the owner of lands, and the sower of it on shares, may maintain a joint action of trespass by reason of their joint possession. I feel myself, therefore, warranted to conclude, in a case of technical form, where the partition line between the forms of different actions is so extremely slight as scarcely to be discerned, that the present suit may be supported.

3. It is obvious, that the same grounds upon which the plaintiff's right of action rests as to receiving compensation for the injury done to him by the defendant, apply also to John Miller, who was a sub-tenant under him. Now Miller had possession of twenty acres, or thereabouts, part of a field of twenty-five acres, which had grain growing on it, and which the defendant cut and carried away. Of these twenty acres, Stultz had not the exclusive possession, but had leased them to Miller for a certain rent. Exception was taken at the trial, and pressed by the defendant's counsel, that for the grain growing on these twenty acres, no damages could be recovered at the suit of the

plaintiff. This was overruled by the judge, but the point was reserved. Entire damages were given by the jury, which cannot now be separated. The defendant had a right to avail himself of any technical defect in the form of the action; and if he was dissatisfied with the decision of the circuit court thereon, he had the benefit of an appeal to this court under the fourth section of the act of the twentieth of March, 1799. The circuit court having been an emanation from this court, and subject to its control, we are bound to do what that court ought to have done upon a legal question made before them. I feel myself, therefore, constrained, though with regret, to give my voice that the judgment of the circuit court be reversed and a *venire facias de novo* be awarded.

Judgment reversed.

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In *Forsythe v. Price*, 8 Watts, 283, the course of decisions on this subject in Pennsylvania is noticed, the court saying: "That the plaintiff below was entitled to the wheat as his way-going crop, has not been denied; nor could his right thereto have been contested with any possible chance of success, after its having been settled and recognized repeatedly, by the decisions of this, as well as of every other court in the state, for half a century and more, last past, that the tenant in such case is entitled to the way-going crop. It is the settled law of the state, founded upon a custom that has prevailed, and been general, at least, if not universal throughout the same," citing the principal case. Lately in *Reeder v. Sayre*, 70 N. Y. 185, it is cited by the court as to the right of a tenant to the out-going crop.

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## MCINTIRE v. WARD.

[5 BERRY, 294.]

**ACKNOWLEDGMENT.**—A deed by husband and wife, executed in Baltimore county, in Maryland, and acknowledged before two justices of that county, whose certificate was accompanied by the attestation of the clerk of the county court, under the seal of the court, "that the persons who took the acknowledgment were justices of the peace, and that there were no magistrates superior to them in Baltimore county," is duly acknowledged within the act which gives effect to acknowledgments by husband and wife, "made before any mayor or chief magistrate or officer of the cities, towns or places, where such deeds are or shall be made or executed, and certified under the common or public seal of such cities, towns or places."

**ACKNOWLEDGMENT BY FEMES COVERT.**—It is not essential that the officer, taking the acknowledgment of a *feme covert*, should literally comply with the form of the statute; it is sufficient if there is a substantial compliance.

**EJECTMENT.** The case is stated in the opinion. The defend-

ant recovered judgment, and the court denying a motion for a new trial, the plaintiff appealed.

*Duncan*, for the appellant.

*Brown and Watts*, contra.

TILGHMAN, C. J. This case depends upon the acknowledgment of a deed made by the lessor of the plaintiff, Isabella McIntire, and her former husband, William Neill, on the seventeenth of February, 1779, whereby the lands claimed in the ejectment were conveyed to Samuel Todd in fee. The deed was executed in Baltimore county, in the state of Maryland, where Neill and his wife then resided, and acknowledged before James Calhoun and Peter Shepherd, two of the justices of the peace for the said county of Baltimore. At that time, the town Baltimore was not incorporated, and the only magistrates of the county were justices of the peace, who were all of equal dignity, and were judges of the county court. A certificate was produced from William Gibson, clerk of the county court, under the seal of the court, declaring that Calhoun and Shepherd were justices of the peace, and that there were no magistrates superior to them in the county of Baltimore. Two objections are made to the acknowledgment of this deed: 1. That the justices of the peace had no power to take it, under the act of assembly of the twenty-fourth of February, 1770; 2. That, if they had power, it is not taken in the manner prescribed in the act.

1. The third section of the act permits deeds made by husband and wife, not residing within the province, to be acknowledged before "any mayor or chief magistrate, or officer of the cities, towns or places, where such deeds or conveyances are or shall be made or executed," and directs that "such acknowledgment shall be certified under the common or public seal of such cities, towns or places." The law had in view cities and towns in which there was a mayor or chief magistrate, and places, not cities or towns, in which there were civil officers concerned in the administration of justice. Such a place I take a county to be, which, although not strictly a body corporate, is something in the nature of one, being bounded by certain limits, within which the justices of the peace have jurisdiction.

It was the intention of the law to facilitate conveyances of land by persons living out of the then province. There was at that time but one city (Annapolis) in the adjoining province of Maryland, and I believe not more than two in New York; and it cannot be supposed that our legislature intended to subject

all persons executing conveyances to the trouble of going to a city to make their acknowledgments. Indeed, unless we understand the word places in the manner I have mentioned, I know not what meaning to affix to it.

But a difficulty still remains. This acknowledgment was not made before the chief magistrate or chief officer, for I agree that the word chief is to be applied to officers as well as magistrates. If there had been a chief magistrate or officer in Baltimore county, and this deed had not been acknowledged before him, the objection would have been fatal. But where several are equal, there can be no chief. In such a case, a literal compliance with the law is impossible, but its meaning is satisfied when the person who takes the acknowledgment has no superior. It has also been objected that the acknowledgment is not certified under the public seal, as the law directs. It is true, the justices do not say that they have caused the seal of the county court to be affixed, because this was out of their power. The seal is not intrusted to their custody, but to that of the clerk. The certificate of the justice is, however, accompanied with the public seal, which is affixed in the only manner the nature of the case admits, and carries with it all that credit which the seal can confer. It appears to me, therefore, that there is no weight in this objection.

2. The second point respects the form of the certificate of acknowledgment. The act directs (s. 2) that the person taking the acknowledgment "shall read to the wife, or otherwise make known to her, the full contents of the deed," and this, it is said, has been omitted, or at least does not appear to have been done. In support of this objection is cited the case of *Watson v. Bailey*, 1 Binn. 470 [2 Am. Dec. 462]. I gave no opinion in that case, because I had decided it in the circuit court, where my opinion was agreeable to that of the supreme court. It was a case very unlike the present, for it did not appear by the certificate of acknowledgment that the wife declared that she had executed the deed voluntarily. It was only said that she acknowledged the deed, and was examined separate and apart from her husband. This was a defect too glaring to be got over. I do not think it necessary to decide at present, whether it should appear on the face of the certificate that the contents of the deed were made known to the wife; and I desire it to be understood that I do not consider that point as having been determined in *Watson v. Bailey*. But supposing it to be so, it is enough if it in any manner appears. No particular form is necessary. The

words of the act need not be used, if its directions are substantially complied with. This court would be departing from the line of its duty if it were studious to avoid conveyances by objections founded merely upon form. Now, it is certified in this case, that the wife "acknowledged the indenture of bargain and sale to be her act and deed, according to its true intent and meaning, and the land and premises therein mentioned to be bargained and sold, with all and every the appurtenances, to be the right, title, interest, estate and property of the within-named Samuel Todd, his heirs and assigns, forever." She knew then that the land was conveyed to Todd in fee-simple, which is the essential part of the deed, and it may be fairly presumed that this was communicated to her by the justices who took her acknowledgment, although I do not conceive that to be material, provided it appears that she had the knowledge. But it is said that it does not appear she knew what the lands were which were included in the deed. This is a severity of criticism which I confess seemed to me to be unnecessary. When the justices certify that she acknowledged the lands within mentioned to be the right, etc., of the grantee, it may be reasonably presumed that the lands were particularly mentioned at the time of taking the acknowledgment, although they are not particularly mentioned in the certificate.

Considering the whole of this certificate, then, it sufficiently appears that the contents of the deed were known to her. I am, therefore, of opinion that the circuit court was right in permitting the deed to be read in evidence, and that the judgment should be affirmed.

Judgment affirmed.

YEATES, J., concurred.

BRACKENRIDGE, J., *contra*.

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## McCORKLE v. BINNS.

[5 BINKLEY, 240.]

**EVIDENCE BY COMPARISON OF HANDWRITING.**—Evidence from a comparison of handwriting, supported by other circumstances, is admissible. So, from a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may be authorized to infer that both were printed by the same person.

**WORDS CONSTITUTING A LIBEL.**—To print and publish of one "that he has been deprived of a participation of the chief ordinance of the church to which he belongs, and that too by reason of his infamous, groundless assertions," is a libel. So is any malicious printed slander which tends to expose a man to ridicule, contempt, hatred or degradation of character.

ACTION on the case against the defendant for two libels, published in his gazette, *The Democratic Press*, on the ninth and sixteenth of September, 1808, against the plaintiff, the editor of the *Freeman's Journal*. To prove publication, the plaintiff called one Donaldson, who stated that he was a subscriber for *The Democratic Press*; that plaintiff came to witness's house after the commencement of the action, and learning, upon inquiry, that witness kept files of that paper, asked permission to examine them; that witness went into an upper room, used for storing lumber, and searched for the papers, but, it being cold there, witness left plaintiff alone and went down stairs; that soon after, plaintiff came down with a number of papers, which witness believed to be his, and at plaintiff's request wrote his (witness's) name on the numbers of the ninth, twelfth and sixteenth of September, 1808. This testimony was admitted against defendant's objection. The case came before the court on motions for a new trial, and in arrest of judgment made by the defendant, upon grounds which appear from the opinion.

*C. J. Ingersoll and Browne*, for the defendant, cited *Hardin*, 167; 6 Bac. Ab. 661, Trial, L. 4; 3 Id. 756, Jury, E. 5; 3 Bl. Com. 125.

*McKean, contra.*

TILGHMAN, C. J. This is an action for two libels, published by the defendant in a newspaper called *The Democratic Press*, of which he is the editor and proprietor, on the ninth and sixteenth of September, 1808. Motions have been made by the defendant for a new trial, and in arrest of judgment. There were five reasons for a new trial filed; but as some of them were abandoned, I shall consider those only which were insisted on. These may be reduced to three heads: 1. That one of the jurors declared, before he was impaneled, that he had made up his mind against the defendant; 2. That the judge who tried the cause erred in law, in permitting the newspapers to be read to the jury; 3. That he erred in suffering the jury to form a judgment by comparing one paper with another.

[No opinion was passed upon the first point, it appearing that the defendant had not established the fact on which the objection was founded.]

2. In order to understand the second and third points, it will be necessary to take a view of the evidence [which the Chief Justice accordingly stated]. If the judge had been satisfied that the papers were not identified, he might have withheld them from the jury; but considering it as a doubtful matter, I

cannot say that he was wrong in submitting it to the jury. It was possible that the plaintiff might have inserted a paper of his own, in the file which he found up stairs; but enough had been shown to authorize the court to submit the matter to the jury. It is like the common case of a deed which is not immediately in issue, being offered in evidence. If the court think it not sufficiently proved, they may refuse to suffer it to be read. But if the evidence in favor of it has any considerable weight, they may and generally do leave it to the jury.

3. Besides the paper of the sixteenth of September found in Donaldson's house, there was another of the same date given in evidence, which was proved to have been purchased from the defendant's shop. This being identified beyond all doubt, the judge told the jury that they might compare the type, devices, etc., on this, with the two papers found in Donaldson's house. The defendant's counsel say this was wrong, because proof by comparison of handwriting is not legal, and *a fortiori* proof by comparison of types, etc. If comparison of hands were in no case legal evidence, it would operate strongly in favor of the defendant's argument; but I do not take the law to go so far. After evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with other writing concerning which there is no doubt. The law is so laid down in Peake, 104, who says: "That the courts of justice have wisely rejected all evidence from mere comparison of hands, unsupported by other circumstances." Some of the old books give as a reason for not submitting comparison of hands, that perhaps some of the jury cannot write. But when they can all write, that reason has no weight; and I believe it is very rare indeed at this time of day to find a jurymen in this city who cannot write. If the discovery of truth is the object of evidence, it must be confessed that in doubtful cases the jury, after hearing other testimony, may be much assisted by a comparison of hands. On the same principle, I think that a foundation being first laid, the jury may be permitted to compare the types, devices, etc., of newspapers. In general such evidence would not be very strong; but cases may occur in which a comparison would be decisive.

The motion in arrest of judgment remains to be considered. It has been contended for the defendant that the matter complained of is not a libel. If it be not, it seems to me that it is no easy matter to compose a libel. Let us see what it is that the defendant has inserted in his paper. He charges the plaintiff

“with having been deprived of a participation of the chief ordinance of the church to which he belongs, and that too, by reason of his infamous and groundless assertions.”

The distinction between slander by words and by printing or writing is so well known that it is unnecessary to dwell on it. Suffice it to say, that any malicious printed slander, which tends to expose a man to ridicule, contempt, hatred or degradation of character, is a libel. But, say the counsel for the defendant, no man's character suffers in Pennsylvania by an exclusion from the rites of the church to which he belongs, because by our constitution the only test for opening the door to honor and office is “a belief in one Supreme Being, and a future state of rewards and punishments.” But how does that bear upon the question? The plaintiff is not charged merely with a voluntary abstinence from the principal sacrament of his church, or being deprived of that sacrament for any innocent or meritorious action, but with an expulsion from it on account of his infamous unfounded assertions. To say of a man in a newspaper that he is guilty of infamous falsehoods is clearly a libel; and is it less so, because the elders of a church have found him guilty, or because, in order to evade the judgment of those elders, he has absented himself from the sacrament of the Lord's supper, as is alleged in the paper of the sixteenth of September? All persons who become members of a religious society are subject to the discipline of that society. The law permits it, and very wisely, because it tends to the preservation of religion and morals. It is understood that according to the rules of the church to which the plaintiff belongs, if he had really been guilty of infamous falsehoods for which he refused or neglected to make atonement, he might, after proper admonition, have been excluded from the sacrament of the Lord's supper. Now, is it possible that after such an exclusion for such a cause, any man could keep his standing either in the society to which he belongs, or in the world at large? In my opinion he must sink under the opprobrium. I can have no doubt, therefore, of the matter charged in the declaration being a libel.

Upon the whole, my opinion is against a new trial, and against arresting the judgment.

YEATES, J., delivered a concurring opinion.

BRACKENRIDGE, J., concurred.

New trial refused, and judgment for plaintiff.

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As to evidence by comparison of handwriting, see *Homer v. Wallis*, and note, *ante*, 169.

## SAVAGE v. PLEASANTS.

[5 BINKLEY, 403.]

**DEVIATION, WHEN EXCUSED.**—Where a vessel is compelled to anchor in a port not described in the policy, by the military power of a belligerent, it is no deviation.

**ILLICIT TRADE, WHEN NOT A BREACH.**—Where a trade is in no other way unlawful than in consequence of an accident over which the insured has no control, the underwriters cannot avail themselves of it, as a breach of warranty.

**BREAKING UP OF VOYAGE.**—Where a voyage is broken up, by reason of an event over which the insured has no control, he may abandon for a total loss.

**NOTION OF ABANDONMENT.**—Unless the insured avail themselves of the right to abandon within a reasonable time after notice of the breaking up of the voyage, a recovery can only be had for a partial loss.

ACTION on a policy of insurance on goods on board the ship Union at and from Philadelphia to Antwerp. The policy contained an agreement by the assured not to abandon in less than sixty days after advice of capture or detention and the usual clause respecting illicit trade. A verdict was taken for the plaintiffs as for a total loss, subject to the opinion of the court upon the following statement of facts: The vessel sailed with the goods on board, on the thirteenth of September, 1807, and was captured in the English Channel by a British privateer on the sixteenth of October, 1807, and carried into Plymouth, where the ship's papers were returned and she allowed to proceed upon her voyage. This event was known to the assured on the first of December. On the twenty-seventh of October the master anchored in Flushing roads, where a guard was placed on board when the authorities learned that the ship had come from England, and she was subsequently ordered to leave the roads and was refused permission to proceed to Antwerp. According to instructions of the consignee the master sailed for Rotterdam on the sixteenth of November or December, it did not clearly appear which from the protest, and was captured the next day by a British vessel of war and carried into the Downs. These events were known to the assured in the beginning of February. On the twenty-fourth of December the ship's papers were returned, and the master being prevented from sailing on his voyage by reason of several accidents and having learned of the Dutch decrees, went to London on the twenty-third of February and discharged his cargo. The assured abandoned on the twentieth of May, on the ground of the breaking up of the voyage and discharge of the cargo.

*Binney and Rawle*, for the defendant.

*Dallas and Ingersoll*, *contra*.

TILGHMAN, C. J. On this case two questions are submitted to the court: 1. Whether the plaintiffs are entitled to recover for a total loss; 2. Whether, if not for a total, they may not recover for a partial loss, and on what principles such loss is to be estimated.

There is no doubt but the voyage has been broken up by events beyond the plaintiffs' control. But the defendants contend that they are not responsible, because it was not broken up by any peril which they insured against; not by perils of the sea, capture or restraint or arrest of princes, but solely by decrees of the French emperor, which under the circumstances of this case prohibited an entry into the port of Antwerp. The defendants rely on the principles established by the late English decisions, cited in the argument, viz.: *Hadkinson v. Robinson*, 3 Bos. & P. 388; *Parkin v. Tunno*, 11 East, 21; *Foster v. Christie*, Id. 205; *Brown v. Vigne*, 12 Id. 288; which appear to have been adopted by the supreme court of Massachusetts, in *Richardson v. The Maine Fire and Insurance Co.*, 6 Mass. 102 [4 Am. Dec. 92]; *Amory v. Jones*, 6 Mass. 818, and *Lee v. Gray*, 7 Id. 349.

On these principles the insured is not at liberty to abandon, where the ship has reached the port of destination, and is refused an entry by the government of the place, or where the voyage is relinquished in consequence of intelligence that the port is blockaded or in the hands of an enemy, or that a hostile embargo has been laid. The decisions alluded to are bottomed on this reason, that the loss is not occasioned by a peril insured against, because a fear of capture or detention is very different from the fact of capture or detention. To permit the assured to abandon in every instance where capture is apprehended, would place the assurer upon a very uncertain and unjust footing, because there might be an affected or even a real fear where there was very little actual danger, and it is truly said that the risk of capture is one of the immediate objects of the insurance, and therefore the insurer has a right to insist on the chance of escape, of which he is deprived by the relinquishment of the voyage.

On the other hand, the assured may be placed in a very bad situation, as the law has been held. If he attempts to enter a blockaded port after notice, he forfeits the right of a neutral; if he attempts to trade in a port into which an entry has been

prohibited, even after the commencement of the voyage, his property is liable to confiscation; and if, being refused an entry, he steers for a different port, the underwriters are discharged, because it is not the same voyage which was insured. Thus, without any default of the assured, his property is left uncovered. From the opinion delivered by Chief Justice Kent, in *Craig v. United Ins. Co.*, 6 Johns. 226 [5 Am. Dec. 222], it appears that the supreme court of New York have doubts whether the law has not been carried too far in favor of the insurers, in the cases which I have mentioned. It is unnecessary to express an opinion on that subject, as the case before is distinguishable from all those which have been cited in favor of the defendants.

It has never been decided that the assured may not abandon and claim for a total loss, where a voyage is broken up by a peril insured against. On the contrary, in *Barker v. Blakes*, 9 East, 283, on an insurance from New York to Havre de Grace, where the ship was captured and carried into England, and during her detention there the port of Havre was declared by the British government to be in a state of blockade. It was held that the assured had a right to abandon, the voyage being broken up in consequence of the capture and detention. Now, in the present instance, the capture and carrying into England were the causes that the ship would not have been permitted to enter the port of Antwerp. For the decree of Berlin would have been no impediment to an entry if there had been neither capture nor going to England.

But it is said that although this carrying into England might have been cause of abandonment, yet it was waived by the resumption of the voyage. Supposing this answer to be sufficient, yet another peril within the policy soon afterwards occurred at Flushing. As soon as the ship came to an anchor, and the master reported that he came last from England, a guard was put on board of her, and continued till she left the port. So that the voyage was stopped by the actual force of the governing power at Flushing. But it is contended for the defendants that dropping anchor at Flushing was a deviation. I cannot think so; it was necessary to come to an anchor and make report, because the fort at Flushing commands the passage of the Scheldt. Again, it is said by the defendants that if the entry into Antwerp was unlawful, they are not responsible for it, because the plaintiffs have agreed not to look to them for any loss by seizure for illicit trade. But the trade was no otherwise unlawful than in consequence of an accident, against

which the defendants had insured, viz., the capture and carrying into England. They must not be permitted, therefore, to avail themselves of an illegality springing from this source.

The voyage, then, having been stopped by actual force of the government at Flushing, the plaintiffs might have abandoned to the defendants and claimed for a total loss. But did they exercise the right in due time? The breaking up of a voyage where the goods remain safe is not a loss total in its nature. It is in the option of the assured to consider it so or not, as he pleases. But he must decide in a reasonable time, and make known his determination to the insurers, otherwise they will be liable for no more than the actual loss. In this case, the plaintiffs had notice of what had happened at Flushing, probably about the middle, but certainly before the last of February. Now, allowing what they contend for, that they had no right to abandon in less than sixty days from the time of notice, still I am of opinion that their abandonment was too delayed, especially when the motive of the delay is considered. They did not abandon sooner, because they had it in view to proceed to Rotterdam; and it was not until this scheme was frustrated by the unlading of the cargo in England that an abandonment was finally resolved on. They have no right, after all this, to throw the cargo on the defendants. But they have sustained damage, and shall they not be indemnified?

This brings us to the second point of inquiry. There is no doubt but that the defendants are liable for an average loss on the first capture and detention in England; that is not disputed. The objects of dispute are: 1. An average loss in consequence of the second departure, and of storms and accidents on the coast of England after leaving Flushing; 2. The loss arising from the difference between the invoice value of the goods, and the proceeds of the sales in England; 3. Freight.

The insurers are not liable for any partial loss not happening in the course of the voyage insured. When the ship was stopped at Flushing, and afterwards released, if she had proceeded to one of the neighboring ports with a view of prosecuting her original voyage as soon as the danger should be over, she would have been covered by the policy. But it appears she sailed from Flushing with a view of proceeding to Rotterdam for a market. This was not the voyage insured, and therefore the insurers are not answerable for losses sustained in the course of it. They are not answerable, then, for the losses by the second capture, and the storms and accidents on the coasts

of England, nor for the difference between the first cost of the goods and sales in England. Indeed I see no principle upon which that difference could be reckoned as a partial loss, as the goods themselves received no damage. As to freight, it was not earned, and therefore the insurers are not chargeable with any loss on that account.

Upon the whole, I am of opinion that the plaintiffs are not entitled to recover for a total loss, but that they are entitled to recover for a partial loss which arose on the first capture and detention in England, and for no more.

YEATES and BRACKENRIDGE, JJ., delivered concurring opinions.

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## JONES v. MOORE.

[5 BINNEY, 573.]

**ACKNOWLEDGMENT OF DEBT TO EXECUTORS.**—An acknowledgment of a subsisting debt made within six years before action brought to the executors of the creditor, will not, where the issue is upon the statute of limitations, support a declaration upon a promise to the testator himself. There should be a special count.

**EFFECT OF ACKNOWLEDGMENT.**—The previous debt is not revived by an acknowledgment; it is merely evidence of a new promise, the previous debt being the consideration.

**PROMISE TO PAY.**—The administrator of the drawer of a note wrote several letters to the executors of the indorsee, recognizing the existence of the demand, but declining to take up the note. He however finally wrote that he would be in town in a few days, and would settle the matter in some way. This was held sufficient evidence of a promise to pay.

**ACTION** on a promissory note drawn by one Gray, the defendant's intestate, payable to Bond and Brooks, and by them indorsed to Wister, plaintiffs' testator. The declaration was upon a promise by the intestate to the testator, and the pleas were *non-assumpsit* and the statute of limitations. The questions reserved upon the evidence were, whether certain letters produced, from the defendant to the plaintiffs' testator, amounted to a promise so as to take the case out of the statute, and if so, whether such promise would support the declaration. The jury found for the plaintiffs, and a motion for a new trial was argued with the reserved points.

*McKean*, for the plaintiffs.

*Binney*, for the defendant.

**TILGHMAN, C. J.** This action was brought on a promissary

note dated the twelfth of February, 1799, given by Robert Gray, deceased, to Bond and Brooks, payable sixty days after date, and indorsed by Bond and Brooks to William Wister, deceased. Issue was joined on the statute of limitations, and on the trial several letters from the defendant Moore were read in evidence, from which the jury, agreeably to the opinion of the judge before whom the cause was tried, inferred a promise to pay the debt. It was reserved as a point for the decision of the court in banc, whether supposing a promise by the defendant to have been proved, it supported the plaintiff's declaration, which was founded on a promise to William Wister, the testator. I will consider first whether such a promise will support the declaration, and secondly, whether the letters warranted the conclusion drawn by the jury.

1. The act of assembly declares, that the action shall be commenced "within six years next after the cause of such action, and not after." If six years elapse after the cause of action accrued, there can be no recovery, although the debt is not extinguished. It remains due in conscience, and is a good consideration for a new promise. It remains in some respects due in law too, for if the defendant omits to plead the act of assembly, he is considered as having waived the benefit of it, and the plaintiff may recover against him. The letters of the defendant are said to contain an acknowledgment of the debt, which, as the plaintiff's counsel contends, is sufficient *per se*, to take the case out of the statute, not because it is evidence of a new promise, but because it revives the debt. There is some confusion, and perhaps some inconsistency, in the cases on this subject; but it appears to me from the reason of the thing and from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise, or what is pretty much the same thing in substance, as a circumstance from which the law will imply a new promise.

To consider this matter on principle. When the defendant pleads *non-assumpsit infra sex annos*, and the plaintiff replies *assumpsit infra sex annos*, how can the issue be found for the plaintiff, without proof of a promise, express or implied, within six years? It is the very point, and the only point in issue. I cannot comprehend the meaning of reviving the old debt, in any other manner than by a new promise. But if there was a new promise in the present case, it was to the plaintiffs the executors, and not to their testator as stated in the declaration, and therefore the declaration would not be supported. Let us next

see how the authorities stand. The case of *Heylin v. Hastings* is reported in 1 Ld. Raym. 389, 421; 12 Mod. 223; Com. 54; 1 Salk. 29; Carth. 471. The report in Carthew is not as good as in the other books. It was an action of general *indebitatus assumpsit*, by an executor, for goods sold, etc., by his testator. Issue was joined on the statute of limitations, and the plaintiff recovered on proof of the debt, and evidence of a promise within six years to the executors to pay the debt if they could prove it. Lord Holt consulted all the judges of England, and they were all but two of opinion that an acknowledgment of the debt was sufficient evidence of a promise, but did not of itself amount to a promise. It was taken for granted that the plaintiff was entitled to recover, but the point does not appear to have been considered, that supposing a promise to have been made, it was a different promise from that laid in the declaration, viz: a promise to the executor and not to the testator.

In subsequent cases, this point has been brought directly into question, and it has been decided that where the promise is laid to have been made to the testator, it cannot be supported by proof of a promise within six years to the executor. In *Green v. Crane*, 2 Ray. 1101, reported by the name of *Dean v. Crane*, in 1 Salk. 28, and 6 Mod. 310, the declaration was on a promise to the testator, issue on *non-assumpsit infra sex annos*, and evidence of a promise within six years to the executor; held that the evidence did not support the declaration, and this by Lord Holt, who delivered the opinion of the judges in *Heylin v. Hastings*. In the *Duke of Marlborough's ex'rs. v. Widmore*, 2 Str. 890, the declaration was on a promise to the testator, issue being joined on the statute of limitations; the plaintiffs were permitted to amend by laying the promise to the executors, on payment of costs. In *Hickman v. Walker*, Willes, 27, the declaration laid a promise to the testator, the defendant pleaded the statute of limitations, and the plaintiff replied that letters testamentary were committed to him within six years, by which cause of action accrued to him, held to be a departure, because it was a different cause of action from that laid in the declaration. In 2 Saund. 63 a. (*notis*), the cases are all collected and the principle asserted, that where an acknowledgment or promise has been made to the executor, it should be declared on accordingly, and a declaration laying a promise to the testator cannot be maintained. The same principle seems to be adopted by the supreme court of New York in *Whitaker v. Whitaker*, 6 Johns. 112. From these authorities, and from the nature of the

issue joined in this case, it appears to me that the evidence, such as it was, did not support the declaration, because it tended to prove a promise to the executors more than six years after the death of the testator.

2. I will now consider the evidence, which consisted of five letters from the defendant to John Wister, one of the plaintiffs. In the first, the defendant asks the plaintiff whether he is at liberty to pay over the assets in his hands to the representatives of Gray, or whether he must withhold them, until the plaintiff's claim was satisfied. In the second letter, the defendant says that he can make no composition but at his own risk, and that Mr. Bond well knew that no part of the money came to Gray's hands. In the third letter, the defendant asks to be informed of the result of the arbitration between the plaintiff and Bond. The fourth letter contains nothing material. In the fifth, the defendant acknowledges the receipt of a letter from Wister, informing him of the decision of the arbitrators between the plaintiffs and Bond, and adds, "I expect to be in the city in a few days, and will settle the matter some way."

From the whole of these letters, it appears that the defendant knew of the plaintiff's claim, and never denied it; on the contrary, he constantly recognized it as an existing debt. The dispute was not with the plaintiffs, but with Bond and Brooks, the indorsers of Gray's note, and who, as Gray said, received the money which was the consideration of the note. The last letter is something very like an express promise—"settling the matter some way," would lead a person to expect some kind of satisfaction. It is certainly much stronger evidence of a promise than several of the cases which have been held sufficient to take a case out of the statute of limitations. I agree therefore with Judge Brackenridge, that the jury were justified in presuming a promise; but as it was a promise not to the testator, but to the executors, it varied from the declaration, and did not support the issue on the part of the plaintiffs. On this ground, I am of opinion that the verdict should have been for the defendant, and therefore there should be a new trial.

New trial granted.

YEATES and BRACKENRIDGE, JJ., delivered concurring opinions.

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See *Danforth v. Culver*, *ante*, 361, as to the nature of an acknowledgment of a debt already barred.

## PEMBERTON v. PARKE.

[5 BIRNEY, 601.]

**DEVISE TO GRANDCHILDREN.**—A testator bequeathed two thousand pounds "to the children and grandchildren of his brother, I. P., deceased, excepting M. F. (a grandchild of I. P.) and her children, she and they not needing it, to be equally divided among those of them who may be then living (at the death of the testator's widow), saving that his cousin, S. R., should have two shares thereof." It was held that the great-grandchildren of I. P. took equally with the children and grandchildren; and that all who were alive at the death of the testator's widow, whether born before or after the testator's death, were entitled to take.

**CASE** stated for the opinion of the court. The questions arose upon the will of John Pemberton, by which he bequeathed, among other things, as follows: "To the children and grandchildren of my brother, Israel Pemberton, deceased, excepting Mary Fox and her children, she and they not needing it, to be equally divided among those of them who may be then living, saving that my cousin, Sarah Rhoades, shall have two shares thereof, two thousand pounds." The word "then" referred to the time of the death of the testator's widow, Hannah Pemberton. The plaintiff is one of the grandchildren, and the defendants are the testator's executors. The points raised for the decision of this court were: 1. Whether children and grandchildren only, alive at the widow's death, are to take; 2. Whether, if great-grandchildren are to take, those born after making the will, or those born after the testator's death, are to come in with the other great-grandchildren for a share.

*Tilghman*, for the plaintiff.

*Rawle*, for the defendants.

**TILGHMAN, C. J.** Two questions are submitted to the court in this case on the will of John Pemberton:

1. In the case of *Hussey v. Dillon*, Amb. 603, Lord Northington says that in common parlance the word grandchildren includes great-grandchildren and all other descendants. In this, I think, he goes too far. In common parlance we understand grandchildren to mean children of children. But it is certain that where it appears by the will that the testator meant to comprehend great-grandchildren, the courts have given it a construction agreeable to the intent. Let us see, then, whether anything appears in this will from which the intent of the testator may be inferred. He must have known very well that the children of Mary Fox were great-grandchildren of Israel Pem-

berton, and when he excepts Mary Fox and her children from any share of this bequest, he must have supposed that without such exception they would have taken. The inference is very strong that he intended to let in great-grandchildren; so strong indeed that I am unable to resist it, although it leads to the inconvenience of cutting up the two thousand pounds into such small portions as makes them of little value. I am, therefore, of opinion that the great-grandchildren come in for a share equally with the children and grandchildren.

2. The next and more difficult question is, whether this bequest is to be limited to those persons who were in being at the death of the testator. If this will had been put into my hands, and I had been asked for my opinion of the testator's meaning without argument or reference to authorities, I should have said at once that he intended the two thousand pounds to be divided among all the children and grandchildren of Israel Pemberton, who should be living at the death of his widow, Hannah Pemberton, without discrimination; for I perceive nothing which affords any indication of an intent to exclude those who should be born after the death of the testator. He looked forward to the death of his widow as the period at which his bounty was to be distributed. It was very natural, therefore, to intend that all those who were then living, and only those should share the legacy.

But it has been very ingeniously and ably argued by the plaintiff's counsel that according to established rules of construction, no person shall be included in this bequest, but those who were in existence at the death of the testator. I have carefully examined the cases cited on the argument, and am of opinion that neither the rule nor the reason of the rule is applicable to the case before us. Before I consider these cases, I will state what the rule appears to me to be. Where a man derives a sum of money generally, to be equally divided among the children of A., those only who are in being at the death of the testator shall take, the reason is that it was the intent that the legacies should be vested at that time; and that the legatees should then receive their money. Now, if all the children are let in, they must all wait till the death of A. before any one of them receives his legacy, because until the death of A. it cannot be known how many children he may have. The result might be that instead of the children taking, many of them might never take; they might die in their father's life-time, in consequence of which their share would indeed be transmitted to their rep-

representatives, but would be of little benefit to them personally, or if they survived their father, the legacy might come so late as to be of little service. But where the testator declares his intent that the legacies shall not vest till a future time, there can be no good reason why all those who were born before that time should not be let in, unless there be something in the will to the contrary. I will now take a view of the cases cited.

In *Northey v. Burbage*, Prec. in Ch. 470, it was said by the counsel, and agreed by the court, that a devise to "all his children and grandchildren," extends only to those *in esse* at the time the will was made, for then the will speaks, and none born after are let in, unless "there had been future words in the will," etc. This case goes rather too far. It would have been more accurate to say, that none born after the death of the testator are let in. But it comes within the distinction I have marked. It is a devise generally to children and grandchildren. *Ellison v. Airey*, 1 Ves. 111, was a devise of three hundred pounds to A., to be paid at her age of twenty-one or marriage, and interest in the meantime for her maintenance and education; "but if she died before twenty-one or marriage, then to the younger children of her nephew B., equally to be divided to and among them." Lord Hardwicke was of opinion that it meant such as should be younger children at the death of A. before twenty-one or marriage, "because it was a contingent legacy, and there was no reason to confine it to the time of making the will, or the death of the testator, for neither was the time upon which the legacy was to vest, and therefore, as the whole was suspended until the death of A., there was no inconvenience to wait until then." This reasoning is strong, and bears directly upon the case under consideration; for here the legacy is contingent, and not to rest until the death of Hannah Pemberton. *Horsley v. Chaloner*, 2 Ves. 83, was a devise of two hundred pounds "to the younger children of A., equally to be divided, and to be paid at their respective ages of twenty-one; and if any die before twenty-one, then to survive to the others;" held by the master of the rolls, that this devise comprehended those children only who were born at the death of the testator, because the extending it to those who should be born after, would defeat the will of the testator, who intended that each child should receive his legacy on attaining the age of twenty-one; whereas, if all were to take, "it would be necessary to wait till the death of A., because it could not be known sooner who would be entitled."

*Coleman v. Seymour*, 1 Ves. 209, was a devise to testator's

daughter A., wife of B., of three thousand pounds, "for the use of her younger children, to be by her distributed among them, in such manners, shares, and proportions as she shall think fit, and if no appointment made by her, then equally to be divided among her younger children, and to survive, if any of the children died under age, or unmarried." The question here was, whether the younger children by a future husband should take; held that they should not, for sufficient reasons mentioned by Lord Hardwicke, but not at all depending on the rule of construction set up by the plaintiff's counsel in this case. On the contrary, so far as concerns that rule, his expressions are as follows: "There have been different determinations of this sort of cases, whether children or younger children should relate to those born at the making of the will, or after the will, or further in the life of the person in whose power it was committed for life; and no general rule has been laid down, but always construed according to the particular words, circumstances and views of the testator. I am delivered from any difficulty which would have arisen had there been any children by B. subsequent to the making, for they were all born then."

In *Heath v. Heath*, 2 Atk. 121, A. devised lands to his wife B., for life, and after her death to C. in fee, charged with the payment of four hundred pounds, within six months after B.'s death, among all the children of E., share and share alike. After the testator's death, his widow, B., made her will, and gave all her personal estate, "among all the children respectively male or female of E." Some years after the death of both the testators, another child of E. was born; held, that it could not take, and very properly, because six months after the death of B., at furthest, was the time for vesting the legacies under A.'s will, and the legacies given by B. would vest immediately on her death. *Garland v. Mayot*, 2 Vern. 105, was a devise of twenty pounds apiece to all the children of her sister B.; the question was, whether a child born after the making of the will, and before the death of the testatrix, should take; held, that it should, which is contrary to what was said by the counsel, and agreed by the court in *Northey v. Burbage*, but throws no light on the present question.

*Cook v. Cook*, 2 Vern. 545, was a devise of real estate to the issue of I. S. The case itself is no way applicable, but was cited for sake of a *dictum* of the lord-keeper, that on a devise to a man and his children of a personal estate, a child born after the death of the testator, and shall not be divested. This

is in just conformity to the principle which I have laid down, and does not help the plaintiff, unless it can be shown that the devise in John Pemberton's will was in general to the children and grandchildren of Israel Pemberton. But that is not the case; for although in the beginning of the sentence it is said to the children and grandchildren of my brother Israel Pemberton, yet it goes on to say to be equally divided among those of them who may be then living (that is at the death of my wife). To get at the testator's meaning, the whole of the sentence must be read; and taking the whole, we find that, instead of an immediate devise to any of them, it is but a contingent devise to such as will be living at the death of the testator's wife.

I am, therefore, of opinion that all the children, grandchildren and great-grandchildren of Israel Pemberton, who were living at the time of the death of Hannah Pemberton, are to come in for a share of the legacy of two thousand pounds.

YEATES, J., delivered a concurring opinion.

BRACKENRIDGE, J., concurred.

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In *Gross's Estate*, 10 Pa. St. 361, the court, referring to the case, says: "The leading principle in relation to such a devise is that, where a bequest is to children in a class, children in existence at the death of the testator are alone entitled, among which posthumous children are to be considered \* \* \*". The same principle is also ruled in *Pemberton v. Parke*.

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## SMITH v. EVANS.

[8 BINNEY, 102.]

**DEFICIENCY IN LAND SOLD.**—A sale was made of "three tracts of land containing nine hundred ninety-one and a quarter acres, and allowance at twelve shillings and six pence per acre." The vendor afterwards obtained patents in his own name, and executed a conveyance of the tracts to the vendee according to courses and distances as in the patents, and stating them as "containing in the whole nine hundred ninety-one and a quarter acres, and allowance, etc., be the same more or less." The vendee having previously paid a part of the purchase-money gave his bonds to the vendor on the day after the conveyance, for the remainder of the purchase-money. Upon a survey made twelve years afterwards the tracts were ascertained to fall short eighty-eight acres. It was held that the vendee was not entitled to any deduction from his bonds, on account of the deficiency.

**ERROR to the common pleas.** The case was *scire facias* upon a mortgage given to Evans by the defendants' testator, Hutchinson, to secure the payment of certain bonds executed by the

deceased as portion of the purchase-money for a tract of land. The question presented was as to the effect of the words "more or less" in the deed conveying the land; the defendants contending that they were entitled to a proportionate deduction from the amount of the bonds, for the subsequently discovered deficiency in the number of acres conveyed.

Judgment was entered for the plaintiff by consent, subject to the opinion of this court.

*Alexander*, for the plaintiffs, in support of their claim for an allowance for the deficiency, cited *Clute v. Robinson*, 2 Johns. 613; *Sugden*, 200; *Finch*, 800; 2 Cha. Ca. 195.

*Forward, contra*, relied upon *Boyd v. Bopst*, 2 Dall. 91; *Bayly v. Merrel*, Cro. Jac. 387; 1 Pow. on Cont. 238, 423; *Russel v. Gulvel*, Cro. Eliz. 657; *Mann v. Pearson*, 2 Johns. 87; and *Higgins' case*, 6 Co. 45.

TILGHMAN, C. J. It appears by a receipt from C. Evans to John Hutchinson, deceased, for sixty-three pounds, fifteen shillings, dated June 22, 1797, that the former had sold to the latter three tracts of land, surveyed but not patented, containing nine hundred and ninety-one and one fourth acres, and the usual allowance at twelve shillings and sixpence an acre, one half to be paid within two months from the date of the receipt, and as soon as Evans should make Hutchinson a legal title to the said lands in fee; Hutchinson was to give him bonds, with warrant of attorney to confess judgment, and also a mortgage on the said lands for the remainder of the purchase-money, with interest, one half to be paid in one year, and the other half in two years from the twenty-seventh of May, 1797. On the first and eighth of March, 1798, Evans obtained patents for the said three tracts in his own name, and executed a conveyance of them to Hutchinson in fee on the twenty-third of March, 1798. In this conveyance they were described by courses and distances, etc., according to the patents, and were said to contain nine hundred and ninety-one and one fourth acres, and allowance of six per cent for roads, etc., be the same more or less. On the twenty-fourth of March, 1798, Hutchinson gave his bonds to Evans for the balance of the purchase-money then remaining due, with a mortgage on the said three tracts of land, said to contain nine hundred and ninety-one and one fourth acres, and described by courses and distances. It has been ascertained by a survey made on the thirty-first of March, 1810, that the quantity contained in the three tracts falls short of nine hundred and ninety-

one and one fourth acres, by the quantity of eighty-eight acres and forty-eight perches, and the question is, whether the defendant shall have an allowance for that quantity at the rate of twelve shillings and sixpence an acre. There is no doubt but the parties at the time of making the contract, took for granted that the three tracts contained nine hundred and ninety-one and one fourth acres, and fixed the total price on an estimate of that quantity at twelve shillings and sixpence an acre. But whether that quantity was an essential part of the agreement, or only descriptive, is not so clear, because both parties knew that the lands had been officially surveyed; the agreement had reference to that survey, and no provision was made for another survey. I give no opinion, however, on the case, as it would have stood on the contract expressed in the receipt, unattended with any other acts showing the intent of the parties, because my opinion is founded in part on other acts. If Hutchinson had supposed that he was to pay for the quantity of land, whether it was more or less than nine hundred and ninety-one and one fourth acres, he should have taken some steps to have it ascertained. On the contrary he did nothing, but suffered Evans to proceed to obtain patents and execute a conveyance of the whole to him, by courses and distances, whether the same should be more or less. By accepting this deed and executing a mortgage, it appears to me that the agreement, so far as concerned the quantity, was closed, both parties consenting to estimate it at nine hundred and ninety-one and one fourth acres. Had there been a surplus, it is not pretended that Evans was to have received anything for it. Can it be supposed then that he consented to so unequal a contract as to make good a deficiency without receiving any compensation in case of surplus?

It is well enough known that original surveys generally contain more than the estimated quantity. To take the quantity upon the estimate then is in favor of the purchaser, and such I conceive to have been the real intent of the parties, manifested by all their acts considered together.

The case of *Mann v. Pearson*, in the supreme court of New York, 2 Johns. 37, is somewhat similar to the present, but much stronger. There the defendant had promised to grant and convey to the plaintiffs, lot number seventy-eight in the township of Lysander, containing six hundred acres. The defendant did convey to the plaintiffs the lot, describing it as containing six hundred acres, more or less. It was held that this was a performance of the agreement, although it turned out that the

quantity was but four hundred and twenty-one and one eighth acres. What weighed much with the court was, that upon the construction contended for by the grantee, he might get more, but could not get less than six hundred acres, which is too unreasonable to be supported, unless clearly expressed. I am of opinion that Hutchinson was bound to pay the whole sum mentioned in his bonds and mortgage, and therefore the judgment should be affirmed.

YEATES, J., dissented.

BRACKENRIDGE, J., concurred with the chief justice.

Judgment affirmed.

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See a similar case, *Nelson v. Matthews*, 3 Am. Dec. 620; and *Nelson v. Carrington*, *post*. The case is followed in *Large v. Penn*, 6 Serg. & R. 489; *Galbraith v. Galbraith*, 6 Watts, 117; *Byers v. Mullen*, 9 Id. 269; *Dickinson v. Voorhees*, 7 Watts & S. 358.

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## OBERMYER v. NICHOLS.

[6 BINNEY, 159.]

**INDEPENDENT COVENANTS.**—Where a covenant goes only to part of the consideration on both sides, and a breach may be compensated by damages, it is an independent covenant, and an action may be maintained against the defendant for a breach of his covenant, without averring performance.

**INTEREST ON RENT.**—Rent carries interest from the time it is due, unless from the conduct of the landlord it may be inferred that he does not mean to insist on it, or unless he acts in an oppressive manner by demanding more than is due, where the tenant is willing to do justice, or there are other equitable circumstances making the charge of interest improper.

**ERROR to the common pleas.** Nichols brought an action of covenant against Obermyer to recover the rent of a certain mill. From articles of agreement produced in evidence it appeared that plaintiff leased to the defendant for the term of four years a certain grist-mill, etc., for a stipulated rent, payable annually; that plaintiff agreed to erect a house adjoining the mill, for its more convenient occupation, and make other improvements about the mill, prior to a certain date after the commencement of the lease. The defendant occupied the premises one year, and then left according to notice. The plaintiff built the house adjoining the mill before the date mentioned, but defendant alleged that it was not as good as the articles called for, and also offered to prove that the plaintiff had not made the improvements agreed upon.

The court charged the jury that the defendant, having enjoyed the use of the mill and premises, was liable for the rent; but that the jury were at liberty to make a deduction as they deemed just from the amount of the rent, for the non-performance by the plaintiff of his covenants; and that interest might be given from the time the rent was payable. Verdict for the plaintiff. Defendant excepted.

*J. Riddle and Duncan*, for the plaintiff in error, cited *Banteleon v. Smith*, 2 Binn. 154 [4 Am. Dec. 430]; *Cook v. Wise*, 3 Hen. & M. 488; 1 Saund. 320, note a.

*McCullough, contra*, cited 6 Bac. Ab. 631, Trial, A.; 1 Saund. 320, note b, c; 1 Tidd. Pr. 384; *Crawford v. Willing*, 4 Dall. 289; *Albright v. Pickle*, 1 Smith's Laws, 381; *Kennon v. Dickens*, Taylor, 236; *Greenleaf v. Kellogg*, 2 Mass. 568; *Clute v. Robinson*, 2 Johns. 595; *Clark v. Barlow*, 4 Id. 183; *Delaware Ins. Co. v. Delaunay*, 3 Binn. 295.

TILGHMAN, C. J. This cause comes before us on a bill of exception to the charge of the president of the court of common pleas of Franklin county.

Two exceptions are taken to this charge: 1. That the court ought to have left it to the jury to decide whether the matters not performed by the plaintiff were so essential, that the non-performance of them bars his recovery; 2. That the jury ought not to have been left at liberty to give interest on the rent.

1. The construction of writings is the province of the court. It was, therefore, for the court to decide whether the covenants to be performed by the plaintiffs were of such a nature that without the performance of them there was no obligation to pay the rent or any part of it. And it appears to me that the decision was right. Because the entry of the defendant was to precede the acts to be performed by the plaintiff, and it is evident that the defendant would enjoy a considerable benefit from the lease independent of those acts. Perfect justice, therefore, was done to the defendant when it was left to the jury to take into consideration the non-performance of the plaintiff's covenant, and to deduct from the rent the amount of the injury which the defendant had sustained.

2. With regard to the interest on the rent, it is to be observed that the jury were not directed to give it at all events, but they were left at liberty to give it or not, as they might think proper. The expressions of the judge are, interest may be given. It is also to be observed, that a court and jury in

Pennsylvania stand in the place both of a court of common law and a court of equity in England. On the subject of interest, we have departed widely from the path of the English courts. We allow interest upon open accounts, whereby the usual course of dealing, or by express agreement, a certain time is fixed for payment, and generally in all cases, where one person detains the money of another unjustly and against his will; and we consider it as a compensation for the damage sustained by the plaintiff in consequence of the defendant's breach of contract. But it is not allowed as a matter of strict legal right, as in bonds with a penalty conditioned for the payment of a certain sum on a certain day, where in case of nonpayment at the day, interest from that time runs of course. In many instances a balance may be due to the plaintiff, and yet it may appear that he has acted so unreasonably, by insisting on more than was due, and driving the defendant to the expense of a suit, as may well justify the jury in refusing any allowance for interest. So it may appear from the conduct of the plaintiff, that he gave the defendant reason to suppose that interest was not expected, and this conduct may have induced the defendant to delay the payment of the principal.

Upon this last ground, I apprehend the nonpayment of interest on quitrents due to the late proprietaries has been sustained; and because interest was not paid to them, it has been inferred, without sufficient consideration, that none should be paid to individuals who were in very different circumstances. I am led to this opinion by the case of *Buchanan v. Montgomery*, at *nisi prius* in Cumberland county, April, 1796. It was then given in charge to the jury by Chief Justice Shippen, that "the practice of the late proprietaries in collecting their quitrents, had generally established the usage in Pennsylvania, that interest was not demandable on rent charges, or other rents, though reserved by deed; and unless unwarrantable and vexatious delay had occurred in withholding rents, interest was not properly recoverable." Taking the law as here laid down, it would be for the jury to judge whether an unwarrantable delay had taken place; and it seems to me, that where it is known to the tenant that the landlord wishes to receive his rent, the delay of payment is always unwarrantable.

A demand of payment on the premises would put the matter out of doubt, and it would be prudent in landlords always to take this step. The principal argument against interest is, that the landlord has power to restrain, and by not exercising

this power, he shows that he is willing to give time for payment. I am by no means satisfied with this reason. It is an abuse of the landlord's benevolence. It should rather be presumed that he is willing to spare the tenant the expense and injury arising from a distress, without relinquishing his claim to a reasonable compensation for the delay of payment. There is no more reason for saying that not distraining is evidence of an intent to relinquish interest on rent, than that the not bringing of an action is evidence of an intent to relinquish it in other cases. That interest upon a rent charge is considered as equitable, even in England, appears by the opinion of Lord Talbot in the *Countess of Ferrers's case*, Cas. Temp. Talb. 2: "The arrears of an annuity or rent charge," says he, "are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, or *nomine poenae*, or some penalty upon the grantor, which he must undergo if the grantee sued at law and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other than to pay the arrears with interest for the time during which the payment was withheld." Now, the clause of entry or *nomine poenae* makes no difference in point of equity, it only serves to give jurisdiction to the court of chancery; and when the parties are before the court, and the tenant asks to be relieved from the penalty, the chancellor considers and decrees according to the real equity of the case.

In the United States different opinions have been entertained on this subject. In Virginia, interest is not allowed: *Cook v. Wise*, 3 Hen. & M. 483; but the court were divided, two judges against one. In New York, interest is allowed: *Clark v. Barlow*, 4 Johns. 183. In Pennsylvania, the point has never been decided in this court. At *nisi prius*, it seems to have been held in two or three cases, that interest should be allowed from the time of the action brought, or of distress made. Upon the whole, there is nothing in the way of our now deciding it upon what shall appear to be the true principle. It would be most extraordinary indeed, if we should allow interest upon an account for goods sold and delivered, where, by the custom of the place, credit was understood to be given to a certain day, and deny it on rent, where by the express agreement of the parties the day of payment was fixed.

I therefore think that rent should carry interest, unless, from the conduct of the landlord, it might be inferred that he meant

not to insist on it, or unless he acted in an oppressive manner by demanding more than was due, where the tenant was willing to do justice. There may be other equitable circumstances making the charge of interest improper, all of which it would be difficult to enumerate. In the present instance, I am of opinion that the consideration of interest was properly left to the jury, and therefore the judgment should be affirmed.

YEATES, J., delivered a concurring opinion.

BRACKENRIDGE, J., delivered a dissenting opinion.

Judgment affirmed.

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See *Selleck v. French*, and note, *ante*, 185, for a consideration of this subject.

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## WHITE v. COMMONWEALTH.

[6 BINKY, 179.]

**SUFFICIENCY OF CHARGE IN INDICTMENT.**—An indictment charging that the defendant, with a certain stone which he held, in and upon the right side of the head of the deceased, feloniously, etc., did cast and throw, and that the defendant, with the stone aforesaid, the deceased in and upon the right side of the head feloniously, etc., did strike, sufficiently charges that the defendant threw the stone and struck the deceased.

**CHARGING DEGREE OF MURDER.**—In an indictment for murder it is not necessary so to describe the offense as to show whether it be murder of the first or second degree. Nor is it necessary that the indictment should conclude against the form of the statute.

**STYLE OF PROCESS.**—Process must go in the name of the commonwealth, but it is immaterial in what part of the precept the commonwealth is introduced, so that the command is given in its name.

**SUMMONING JURY.**—In a precept to the sheriff to summon the grand and petit jury, it is sufficient to command him to cause to come before the judges twenty-four good and lawful men, without commanding him in what manner they are to be drawn or selected.

**JURORS FROM BODY OF COUNTY.**—A precept to the sheriff, commanding him to cause to come, etc., "twenty-four good and lawful men, of the body of the county of C., aforesaid, then and there to inquire, present, do and perform such things as on behalf of the commonwealth shall be enjoined them," and also a competent number "of sober and judicious persons, and none other, as jurors for the trial of all issues," etc., contains no command to convene the petit jurors from the body of the county of C.; and therefore, if it does not appear by the return or the panel, that the petit jurors, in fact, came from the body of the county, the error is fatal.

**ERROR to the court of oyer and terminer.** The plaintiff in error had been indicted and adjudged guilty of murder. The exceptions to the indictment appear from the opinion.

*Watts and Duncan*, for the plaintiff in error.

*Carothers*, contra.

TILGHMAN, C. J. Edward White has been convicted of murder in the first degree, and judgment of death passed against him by the court of oyer and terminer for the county of Cumberland. By permission of the attorney-general, the record has been removed to this court, and several errors have been assigned on which we are now to deliver our opinion. The exceptions which have been taken go both to the indictment and the process. To the indictment it is objected, first, that the offense is not charged with sufficient certainty, and, next, that it does not conclude against the form of the act of assembly.

1. It is said in the indictment, that Edward White, with a certain stone which he held in his right hand, in and upon the right side of the head, near the right temple of Samuel Sampson, feloniously, etc., did cast and throw; and that the said Edward White, with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid Samuel Sampson in and upon the right side of the head, near the right temple of him, the said Samuel Sampson, feloniously, etc., did strike, etc. The objection is, that it is not said in the first instance that White threw the stone at all, but only that he threw with the stone; and that the subsequent averment that he struck Sampson with the stone so as aforesaid cast and thrown, does not amount to a positive assertion, because it refers to the casting and throwing as aforesaid, when, in fact, it had not been said before that he did cast and throw it. The action of White is not as well described as it might have been; but upon the whole it is sufficiently alleged that he threw the stone and struck Sampson with it. Casting and throwing with a stone, cannot be understood as using a stone for the instrument of throwing; it was the object thrown, and the cast or throw was made upon the right side of the head of Sampson. This, to be sure, is an awkward kind of expression and not very good grammar; but in the words which follow, it is positively asserted, that White struck the deceased with the stone cast as aforesaid. Taking it altogether, then, it sufficiently appears that White threw a stone with which he struck Sampson, and thus killed him.

2. Where a statute creates an offense, the indictment must charge it as being done against the form of the statute. But where the statute only inflicts a penalty upon that which was an offense before, it need not be laid to be against the form of

the statute, because in truth the offense does not violate the statute. That this is the rule was decided in the case of the *Commonwealth v. Searle*, 2 Binney, 339 [4 Am. Dec. 446]. The only question then will be, was murder of the first degree an offense created by act of assembly? This depends on the second section of the act, "for the better preventing of crimes," etc., passed April 22, 1794. After reciting that the several offenses which are included in the general denomination of murder, differ so greatly in degree of atrociousness that it is unjust to involve them in the same punishment, it is enacted that all murder which shall be perpetrated by means of poison, etc., etc., shall be deemed murder of the first degree, and all other kinds of murder, shall be deemed murder of the second degree, and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict whether it be murder in the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly. Now this act does not define the crime of murder, but refers to it as a known offense; nor so far as concerns murder in the first degree, does it alter the punishment which was always death. All that it does is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments.

It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself that it was not supposed any alteration would be made. It seems taken for granted that it would not always appear on the face of the indictment of what degree the murder was, because the jury are to ascertain the degree by their verdict, or in case of confession the court are to ascertain it by examination of witnesses. But if the indictments were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner guilty in manner and form, as he stands indicted. In the case of the *Commonwealth v. Joyce and Mathias*, Oyer and Terminer, Philadelphia, February, 1808, before C. J. Tilghman and Judge Smith, who were convicted of the murder of Sara Cross, it was moved in arrest of judgment, because the indictment did not charge the murder to have been committed by a willful, deliberate and premeditated killing, as expressed in the act of assembly. But the motion was overruled, and the

murderers executed. I am therefore of opinion that the indictment is good.

The exceptions to the process remain to be considered. The precept to the sheriff is in the names of the president of the district and two of the associate judges of the court of common pleas, under their hands and seals. The style is, "the judges to the sheriff greeting: In the name and by the authority of the commonwealth of Pennsylvania, you are hereby commanded," etc. It is objected: 1. That the style should have been "the commonwealth to the sheriff greeting;" 2. That the precept should have been issued under the seal of the court of oyer and terminer; 3. That the sheriff should have been commanded to have the jurors selected and drawn in the manner directed by law; 4. That the sheriff is not commanded to return petit jurors of the county of Cumberland, nor does it appear on the record that they were of that county. These objections shall be considered in their order.

1. It is declared by the present constitution of Pennsylvania, art. 5, sec. 12, that the style of all process shall be "the commonwealth of Pennsylvania;" and this provision is copied from the twenty-seventh section of the frame of government of 1776. The expression of the style being in a certain way, does not convey a precise idea. It is said by the counsel for the prisoner that the process shall begin with these words, and in general process issuing from courts of record does not begin so; and yet the substantial intent of the constitution would seem to be satisfied if the command is given in the name and by the authority of the commonwealth in whatever part of the precept that command is expressed. In the same section of the constitution, where it is intended to direct the place in which particular expressions shall stand, it is clearly pointed out "all prosecutions shall conclude against the peace and dignity of the commonwealth." It is now thirty-seven years since the formation of the constitution of 1776, and during all that time the precepts of courts of oyer and terminer have been in the same form as this. Courts of oyer and terminer were held soon after the making of that constitution, so that the construction first put upon it was contemporaneous with the constitution itself, and no doubt adopted by some of those who were framers of it. A construction thus commenced and thus continued is entitled to the highest respect. The imperfections of language causes much uncertainty in writings which have been drawn up with the greatest deliberation. It is of great importance that

the construction should be fixed as soon as possible, and when once fixed, it should be adhered to, unless palpably wrong, and productive of inconvenience. It is of no consequence in what part of the process the commonwealth is introduced, so that the command is given in its name. This is done in the precept under consideration, and as it is agreeable to constant usage, I am of opinion that it is sufficient.

2. Much of what has been said will apply to the second exception. The usual form has been under the seals of the judges. Precepts that issue or are supposed to issue from a court of record during its session are under the seal of the court. But this is not the case with precepts for a court of oyer and terminer. Emergencies may arise requiring such courts to be held on a sudden. There are no particular periods appointed by law for the holding of them. The judges may appoint them at their pleasure, and this appointment need not be made during the sitting of any court. As for a seal, there is no occasion for a particular one for these courts. The judges of the supreme court have no seal for the courts of oyer and terminer held by them; and this is the case in many instances with the judges of the common pleas. There is no weight, therefore, in this objection.

3. The command to the sheriff is, that on a certain day he cause to come before the judges twenty-four good and lawful men, etc. This is the accustomed and best form. Entering into details is dangerous, because something may be omitted, and it is unnecessary, because the sheriff must be supposed to know his duty, and is bound to perform it. If he neglects any part of it those whom it concerns may set the process aside.

4. The fourth and last exception is, that it does not appear that the petit jury came from the body of the county, and if well founded it is fatal. The command to the sheriff is that he cause to come, etc., "twenty-four good and lawful men of the body of the county of Cumberland aforesaid, then and there to inquire, present, do and perform such things, as on behalf of the commonwealth, shall be enjoined them; and, also, a competent number of sober and judicious persons, and none other, as jurors for the trial of all issues," etc. Why the words good and lawful men, applied to the grand jurors, are dropped, and sober and judicious persons put in their place, as to petit jurors, I know not. The act of twenty-ninth of March, 1805, does indeed direct that jurors shall be sober and judicious persons; but the words good and lawful men comprehend that and every other

requisite. I do not think, however, that this change of phrase is material; but are the words "of the county of Cumberland," which follow good and lawful men, connected by the copulatives, and also, with the words next succeeding "a competent number of sober and judicious persons," etc. The description of the two sets of jurors are each complete and independent of the other; and the use of the copulative expressions is only to show that the sheriff is commanded to cause, to come, etc., both one jury and the other. How this form crept in among us, I am at a loss to imagine. I have examined the printed entries of criminal proceedings, and find them quite different. They particularly mention that each jury is to come from the body of the county. The return of the sheriff makes no mention of the county; he indorsed on the precept "jury summoned as within commanded as per list annexed." Annexed is a list of the jurors mentioning the townships in which they reside, but nothing is said of the county. One of the townships is Allen. I know that there are townships of that name in several counties, and it may be so with others. If I were allowed to conjecture, I should have no doubt but that the whole jury was of Cumberland county; and were it a civil proceeding, I would try hard to get over the objection. But where life is at stake, I dare not endeavor to be ingenious. Having attentively considered the precept, it appears to me, that without torturing it we cannot understand that the petit jury were to be of the county of Cumberland. I am therefore of opinion that the judgment was erroneous and should be reversed.

Judgment reversed.

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As to the necessity of framing the indictment according to the statute, Wharton, 1 Cr. Law, sec. 411, thus lays it down: "If the statute is only declaratory of what was a previous offense at common law, without adding to or altering the punishment, \* \* \* the indictment need not conclude against the form of the statute. Where a statute only inflicts a punishment on that which was an offense before, judgment may be given for the punishment prescribed therein, though the indictment does not conclude *contra formam statuti*." The same author, 2 Cr. Law, sec. 1067, refers to the sufficiency of the charge as held in this case, noticing a similar case: *State v. Owen*, 4 Am. Dec. 571. At sec. 1115 he says: "It is not necessary, nor is it the practice to designate the grade of homicide in the indictment, nor that the killing should be charged to be willful, deliberate, and premeditated." In *State v. Cleveland*, 58 Me. 587, the dictum of Chief Justice Tilghman is doubted, "that if the indictment were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner guilty in manner and form as he stands indicted." Dickerson, J., says: "The question before the court in that case was, not whether the jury should specially find the degree of murder, but whether the degree of murder should

be set forth in the indictment. The case did not call for the remark of Chief Justice Tilghman; and it has been universally treated as a dictum not only by the courts in other states but by the court in Pennsylvania, in more recent cases. Accordingly it was held in *Johnson v. Commonwealth*, 24 Pa. St. 386 (decided in 1855), under a statute requiring the jury to find the degree of the murder, that in an indictment charging the killing by drowning, a verdict of 'guilty in manner and form as the prisoner stands charged' is not a conviction of murder in the first degree. In that case the sentence of death was reversed and annulled on error, because the jury did not find the degree of the murder, and the record remitted to the court to pass such sentence as was authorized for conviction of murder in the second degree."

The dictum is also condemned in *Ford v. State*, 12 Md. 544.

## COMMONWEALTH v. SHEPHERD.

[6 BENEY, 283.]

**EVIDENCE AS TO NON-ACCESS.**—If the husband has access to his wife, no evidence short of his absolute impotence can bastardize the issue; but if they live at a distance from each other, so that access is very improbable, the question of the legitimacy may be decided on a consideration of all the circumstances.

**EVIDENCE OF WIFE.**—Upon an indictment for fornication and bastardy a married woman is a competent witness to prove the criminal connection with her.

**INDICTMENT, and conviction of fornication.** Motion for a new trial made upon grounds which appear from the opinion.

*Browne*, for the defendant.

*Ewing*, *contra*.

**TILGHMAN, C. J.** This is a motion for a new trial by William Shepherd, who has been convicted of fornication with Sarah Myers, and begetting a bastard child on her body. The reasons assigned are, that the judge who tried the cause admitted improper evidence, and erred in his charge to the jury. Also, that the verdict was against the evidence. Sarah Myers was a married woman. Her husband had left her some years previous to the birth of the bastard child; he lived in New York and she in Kensington, near Philadelphia. The judge charged the jury, that if, on consideration of all the evidence, they should be of opinion that the husband had no access to his wife, and that the child was really begotten by the defendant, they might find him guilty of both fornication and bastardy. In this he was clearly right. In old times it seems to have been holden that a child born of a married woman, whose husband was within the four seas which bounded the kingdom, could not

be considered as illegitimate. This was unreasonable. When the husband has access to his wife, it is right that no evidence, short of absolute impotence of the husband, should bastardize the issue. But where they live at a distance from each other, so that access is very improbable, the legitimacy of the child should be decided upon a consideration of all circumstances. The law was so laid down in *Pendrell v. Pendrell*, in the fifth year of George II., 2 Stra. 925, and has ever since been considered as settled.

With respect to the evidence admitted at the trial, it is objected, 1. That Sarah Myers was not a competent witness; and, 2. That granting her to be such, she ought not to have been asked "how long it was since she had seen her husband." The first objection is founded upon a supposition that her evidence was received under our act of assembly, which provides that a man may be convicted of bastardy on the oath of the mother of the child, being a single woman. My brother YEATES, before whom the cause was tried, mentions the case of Dr. McClean, against whom a married woman was admitted as a witness after full argument, and the law, as he conceives, has been so taken ever since. McClean's case was before my memory, but I have no doubt of its being decided on correct principles, because, throwing the act of assembly out of question, the woman would be a competent witness from the necessity of the case, upon common law principles. I do not mean that she would be a witness to all purposes, but only as far as the necessity extends, that is to prove the criminal connection. Further than that she ought not to go; because everything else is capable of proof by other persons, and nothing but necessity will warrant the dispensing with the rule, that a woman shall not be a witness in a matter wherein her husband is concerned; and here he is very much concerned, both in property (for he is bound to maintain the child if it be legitimate) and in character.

That the wife may be a witness to the extent I have mentioned, and no further, I consider well established in the cases of *The King v. Reading*, Cas. Temp. H. 79, and *The King v. The Inhabitants of Bedel*, Id. 379; 2 Str. 1076; Andr. 8. I should, therefore, be of opinion, that it was improper to ask "how long it was since the wife saw the husband," unless something which had been asked by the defendant's counsel on her cross-examination, made way for it. Without some such circumstance, it would have been improper, because the answer "that she had not seen her husband for eight years," might go

far towards proving his non-access, which it is not competent to her to prove, that being a matter capable of proof by others. The judge considered the questions put by the defendant on the cross-examination, as making way for the question objected to, viz., "When had she last seen her husband?" I think it unnecessary to consider that matter, because the judge afterwards expressly charged the jury that they were not to consider anything which fell from Sarah Myers as evidence of non-access. The force of what she said was therefore taken off, just as in the common case of a witness, who, some time after being examined, is discovered to be interested in the cause, when the court tells the jury that all which had been said, is to go for nothing.

But it is again objected that it may not be in the power of the judge to remove from the mind of the jury, the impressions which the evidence had made. I answer that it is not to be supposed that the jury will disregard the court's direction in matters of law. Nor is there any reason to suppose they did so in this case, where there was strong evidence of non-access by other witnesses. It was proved that the husband had left his wife, and resided in New York for several years before the birth of the child; nor was the presumption of non-access resulting from this, encountered by evidence sufficient to shake it. There was proof, indeed, that the husband had been seen occasionally in Philadelphia, but not at or near the time when this child was begotten.

Had the case rested upon the evidence of the woman alone, I should have been decidedly for a new trial; but it appears to me that without her testimony the jury would have been warranted in concluding that there had been no access. Having said thus much, it is unnecessary to add any remarks on the remaining objection of the verdict being against the evidence. Upon the whole my opinion is against a new trial.

YEATES, J., delivered a concurring opinion, BRACKENRIDGE, J., concurred.

Judgment for the commonwealth.

## COMMONWEALTH v. WOLBERT.

[6 BINNEY, 292.]

**SURETIES NOT DISCHARGED BY LACHES OF PUBLIC OFFICERS.**—An omission on the part of the accounting officers of the commonwealth for a year and upwards to compel the prothonotary of the common pleas to settle his account of fees, does not discharge the sureties in the official bond of the prothonotary, although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution.

**VOLUNTARY BOND BINDING ON PUBLIC OFFICER.**—The bond of the prothonotary, though not required by any law, is nevertheless binding on him and his sureties as a voluntary bond; and being in the first place for the use of the commonwealth, a payment under it to an individual creditor of the prothonotary is at the peril of the surety. The commonwealth must be satisfied in the first instance to the amount of the penalty.

**SCIRE FACIAS** upon a judgment obtained on the official bond of Frederick Wolbert, clerk of the court of common pleas. A verdict was taken for the plaintiff, subject to the opinion of this court, from which the facts appear.

*Wallace and Ingersoll*, for the commonwealth.

*Browne and Binney*, for the sureties.

**TILGHMAN, C. J.** Frederick Wolbert was appointed prothonotary on the thirtieth January, 1809. His bond is dated the second February, 1809, and he was removed from office the twenty-fifth of April, 1811. It is the duty of the several prothonotaries to render an annual account of the fees received by them to the accounting officers of the commonwealth; and those officers are authorized to compel the rendering of an account, and the payment of the balance. On the fourteenth of March, 1811, F. Wolbert rendered an account of fees received from the twenty-sixth of February, 1810, to the first of October of the same year. At the same time he wrote a letter to the auditor-general, apologizing for not having rendered an account for his first year, ending the twenty-sixth of February, 1810, and praying a short indulgence. This letter was sent by W. Binder, one of F. Wolbert's securities, together with a sum of money to the amount of the balance due on the account rendered. As soon as this account was settled by the accounting officers, Wolbert was removed from office. An action was commenced on his official bond to the next term of the supreme court, which was tried the twenty-second of June, 1812, and the sum of eight hundred and ninety-six dollars and seventy cents found to be due the commonwealth. Judgment was entered for the com-

monwealth for the penalty of the bond at December term, 1812. On this judgment the present *sci. fa.* was brought to March, 1813, for the recovery of the balance due on another account of F. Wolbert for fees received from the first of October, 1810. to the twenty-second of April, 1811.

It is contended, in the first place, by the counsel for the sureties, that they are discharged by the laches of the accounting officers in not calling on Wolbert to render his account immediately, on the expiration of the first year. They lay it down as a principle, that where the obligee agrees to do a thing which would lessen the responsibility of the sureties, and omits to do it, they are discharged. Such is the case of *Montague v. Titchcombe*, 2 Vern. 518, where one being bound as surety for the good conduct of his son, who was an apprentice to a merchant, and the master undertaking to see the cash account settled monthly, it was held that the surety was discharged from his responsibility for embezzlements of cash by the apprentice, after the first month, because the master had failed in his engagements to see the cash accounts settled. This was very reasonable, because if the master had performed his part of the contract, it is probable that the evil practices of the apprentice would have been prevented. But although the commonwealth, for its own benefit, has authorized the accounting officers to compel a settlement and payment, yet it never engaged to the sureties that this should be done at any particular time. If, indeed, the sureties had requested those officers to proceed, and they had refused or neglected to do so, the case would have borne a very different aspect; but until such a case arises I shall give no opinion on it. The case of *The People v. Jansen*, was also cited from 7 Johns. 332 [5 Am. Dec. 275]. There the sureties of a loan officer were held to be discharged, through the negligence of the public officers, whose duty it was, by the law under which the bond was taken, to examine the loan officer's accounts annually, and remove him in case of default. The negligence in that case was very extraordinary indeed. The loan officer's accounts were not examined for several years, and he was suffered to remain in office ten or twelve years after making default. Meanwhile the surety died without having received notice of the default. Add to this, that after a suit had been brought against the principal, while in good circumstances, indulgence was given until he became insolvent.

But how different was that case from the present. Frederick Wolbert was removed from office as soon as it was ascertained

that he had not completely accounted for all fees received up to the time of the rendering of his account, which was but a little more than two years from his appointment; and there is great reason to suppose that his sureties were acquainted with the state of his accounts, because Binder was the bearer of the letter of the fourteenth of March, 1811, in which indulgence was asked on the account for the first year. It is always in the power of the sureties to know whether an account has been rendered; and they cannot be said to act with reasonable prudence if they do not make this inquiry. There is no occasion to say, at present, whether any and what degree of indulgence to the principal will discharge the surety, because I am decidedly of opinion that there is no pretense for a discharge from any indulgence given in this case.

It was once decided by the court of common pleas for Northumberland county, that the bare omission to bring an action on a bond for a private debt, after it was due, was a discharge of the surety. But that decision was reversed by this court without hesitation, because there is no principle of law or equity which calls upon the obligee to proceed with such rigor against the principal, on peril of losing his security.

It has been determined in England that where the creditor, without consulting the surety enlarges the time of payment, so as to put it out of his power to proceed against the principal, if required so to do by the surety, this shall operate as a discharge, because the debt is put upon a different footing from that on which it originally stood, and from that on which the surety had a right to expect it would remain. But it is against all equity and reason to say that the security is discharged by the mere omission to bring suit, which makes not the least alteration in any part of the agreement, express or implied. Nor do I understand that any such principle is contended for in the case of a private debt; for certainly it would introduce a scene of distress, not called for by public convenience or expediency, or required by the fair construction of the contract. A distinction is taken between a private debt and one due from a public officer, who by law may be compelled to account. But granting that such distinction is not without foundation, yet it would require much stronger circumstances than this case presents to operate as a discharge. It would be essential that the indulgence should be without the approbation of the surety, which I do not take to be the case here, and that alone is decisive. I say I do not take it to be the case, because when I see Binder

carrying the money due on the account rendered, and the letter by which Wolbert prayed indulgence on the account, embracing the first period after his appointment, I cannot but conclude that he (Binder), so far from thinking himself discharged, joined with Wolbert in the petition for further indulgence.

Another question is made in this case. Supposing the commonwealth entitled to a recovery, to what amount shall it be. The defendants claim credit for a payment made to Joseph Parham, who brought suit on the same bond May 22, 1812. The suit was submitted to arbitration, and the arbitrators made an award in favor of the plaintiff for four hundred and fifty-six dollars and seventy cents, which was filed July 2, 1812, and of course by virtue of our act of assembly had the effect of a judgment on that day, so that Parham's suit was instituted after that of the commonwealth, but his judgment was prior. We are to consider then, what is the nature of the official bond of the prothonotary, and for whose benefit was it given. After a careful examination, it appears that there was no act of assembly requiring such bond. Before the adoption of the present constitution, it was not the custom for the prothonotaries to give bonds; but since, the governor has required them of his own motion. Supposing them then to be voluntary on the part of the obligors, yet being given for a useful purpose they are valid in law. But for whose use are they?

The bond in this case is given to the commonwealth for the use thereof. These are the expressions, and taken literally, they indicate a use for the commonwealth only. But perhaps the use may be extended to private persons, who may be injured by the official misbehavior of the prothonotary, because the condition extends to all the duties of his office. We have an old act of assembly made in the year 1713, by the fourteenth section of which, 1 Smith's Laws, 85, it is enacted that all bonds given by direction of any law, by persons in office, for the due execution of their respective offices, shall be for the use of, and in trust for the persons concerned, and the mode of proceeding on such bonds is pointed out. But this act does not comprehend the bond in question, because it is not given by direction of any law. If private persons have any interest in it, then it must be because from its nature it appears to be in trust for them. It is unnecessary, however, to decide that point, if the commonwealth has, as I am clearly of the opinion it has, a preference for its whole claim, against all private persons, not only because the bond is expressed to be for its use

but because the first suit was commenced for the commonwealth; and the defendants shall not avail themselves of their negligence or collusion with Parham in suffering him to obtain judgment in his action. It was the duty of the defendants to plead before the arbitrators, that a prior action had been brought for the use of the commonwealth, and was then depending, and if the arbitrators had overruled the plea an appeal should have been entered. So that if the defendants suffer by Parham's judgment, they have nobody to blame but themselves.

Upon the whole, it appears that the commonwealth obtained judgment against the defendants for the penalty of the bonds, and that there is no act of assembly, by which any private person is let in. Neither is there any principle of common law, or of equity, by which the commonwealth will be deprived of the benefit of this judgment to its full extent, as long as it has a just demand unsatisfied, arising out of a breach of the bond. But it has been proved that there is a just demand unsatisfied for fees received by Frederick Wolbert, to the full amount of the penalty of the bond, and something more. I am, therefore, of opinion, that the commonwealth should recover all that part of the penalty which remains after deducting the amount recovered in the first action.

YEATES, J., delivered a concurring opinion.

BRACKENRIDGE, J., concurred.

Judgment for the commonwealth.

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## BIDDIS v. JAMES.

[6 BINKLEY, 321.]

**EVIDENCE OF LAWS.**—An edition of the laws published under the authority of the legislature is evidence, as well of the private as of the public laws it contains.

**ERROR** to the court of common pleas. The principal point in the case was as to the admissibility in evidence of a pamphlet, printed under the authority of the legislature, to prove a private act therein contained.

*Sergeant and Ingersoll*, for the plaintiff for error.

*J. Erving and Tilghman*, *contra*.

**TILGHMAN**, C. J. The first paper objected to was a copy of the act of assembly, printed by the public printer, under the direc-

sion of the secretary of the commonwealth, who was authorized by the legislature to compare the copy with the original roll. By the law of England, the copies of the public laws, printed by the king's printer, are read in court, not as evidence, but as bringing to the mind of the court, a matter which every man is supposed to know, because every man is a party to the public laws, having consented to them by his representative. But a private law is to be proved as any other matter of fact. This distinction between public and private laws, is by no means satisfactory, when applied to the actual state of the world. Whatever reason there might be for supposing that every man knew the law in ancient times, when laws were few and short, and at the end of each session a copy of the laws was sent to the sheriff of every county, who made public proclamation of them at the county court, and suffered the people to read them, and take copies at their pleasure, 1 Bl. Com. 185, yet there is no ground for this supposition at present, when laws are numerous, long and intricate, when they are not published by proclamation; and when in fact, neither the people nor even the judges have any opportunity of knowing them, but from printed copies. It is for this reason that it has been usual for the legislatures of the several states to have the laws printed by authority. Confidential persons have been selected to compare the copies with the original rolls, and superintend the printing. The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on as the exemplification, verified by an officer, who is the keeper of the record. In England there is no provision by parliament for the publication of their laws. They are printed by the king's printer. They ought, therefore, to be a difference in the law of evidence, respecting printed copies in the two countries. And we find that when the subject has been presented to the minds of the American judges, they have not failed to be struck with the difference. In the case of *Thomson v. Musser*, 1 Dall. 463, this court admitted the printed copy of a Virginia act of assembly. This decision abolished the distinction between public and private acts, because it could not be supposed that the people of Pennsylvania were acquainted with the public laws of Virginia, having never made or consented to them, either in person or by representative. In *Young v. The Bank of Alexandria*, 4 Cranch, 388, the subject was brought before the supreme court of the United States, when Chief

Justice Marshall expressed his opinion, that whether the laws were public or private, yet being printed by the public printer, by order of the legislature, agreeably to a general act of assembly for that purpose, it must be considered as sufficiently authenticated. He declared indeed at the same time, that the court would not prevent counsel from arguing the point, if they thought they could support the contrary opinion, but the counsel declined the attempt. This opinion of Chief Justice Marshall appears, to me, to be perfectly correct. I am for admitting the printed copies, authorized by the legislature, either of this or any other state, whether the laws be public or private.

[The remainder of the opinion was confined to the construction of certain local statutes and is of no general value.]

YEATES and BRACKENRIDGE, JJ., concurred.

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See *Canfield v. Squire*, 1 Am. Dec. 71; and *Woodbridge v. Austin*, 4 Id. 740.

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## MCALLISTER v. MARSHALL.

[6 BINNEY, 338.]

**ASSIGNMENT, WHEN FRAUDULENT.**—An assignment executed by an insolvent debtor with an understanding that part of the property assigned shall be conveyed to trustees for the use of his family, is, so far as it respects the property conveyed in trust for the family, fraudulent and void as to all creditors who do not assent to the arrangement, and the non-assenting creditors may take it in execution.

**EJECTMENT** for a house and lot of land. The plaintiff claimed under a purchase at a sheriff's sale upon an execution in an action in which plaintiff had recovered judgment against defendant. Defendant's title was under a certain assignment. Prior to the action in which plaintiff had obtained judgment, Charles Marshall & Son made an assignment of all their effects to Pratt, Morrell and Smith in trust for the benefit of the assignors' creditors. These trustees had been regularly chosen at a meeting of the creditors, who had executed powers of attorney to the trustees to dispose of the effects for the benefit of the creditors, and had executed releases, in full, of their demands against Marshall & Son. Soon afterwards, the trustees executed a deed of assignment of the property in question, to certain trustees for the use and benefit of Marshall's family. It was under this assignment defendant claimed. Pratt, Morrell and Smith were creditors of defendant; plaintiff knew of this second assignment

at the time of the sheriff's sale; but had never attended any of the meetings of the creditors nor signed the powers of attorney to Pratt, etc.

The question was, as to the validity of the assignment in trust for the family of Marshall, and its sufficiency to protect the property from plaintiff's execution.

*Hopkinson and Tilghman*, for the plaintiff.

*Levy and Ingersoll*, contra, cited *Chapman v. Tanner*, 1 Vern. 267; *Walker v. Preswick*, 2 Ves. 622; *Fawell v. Fawell*, Amb. 724.

TILGHMAN, C. J. When the cause was argued, I strongly inclined to the opinion that the trust might be supported, because the creditors by whom it was created had debts fairly due from Charles Marshall and son, to a much greater amount than the value of their whole property; so that the relinquishment of part in favor of the family seemed no more than giving up what was their own; and although this view of the case is just, so far as concerns the debtor and those creditors who wished to provide for his family, yet on full consideration of the bearing of this transaction on other creditors, I have been induced to alter my opinion. We have no bankrupt law. In considering, therefore, what an insolvent debtor may do, and what he may not do, as to the disposal of his estate, we must have recourse to the common law, and the provisions of the statute, 13 Eliz. c. 5. The debtor may prefer one creditor to another, and for this purpose he may make a conveyance of any part of his property at its fair value. But he cannot, under a pretense of preferring one creditor, make a conveyance for the purpose of hindering others from coming at his property; nor, above all, can he by any mode of contrivance or secret trust, cover any part of his effects from the legal process of any of his creditors. If Charles Marshall had proposed to part of his creditors to accept a conveyance of his whole estate, for the purpose of excluding all others, who would not consent that a portion of it should be secured for his wife and children, it cannot be doubted but the proposal would have been fraudulent, and its acceptance by the creditors could not have washed away the stain. I do not believe that Mr. Marshall intended in fact to defraud; and I am very sure, from personal knowledge of many of the creditors, that they were actuated solely by motives of benevolence. But we must discard all private knowledge or conjecture, and consider the case as it is presented on the written evidence.

Now, when I look at the assignment, and the reconveyance

of part of the assigned property in trust for the family of the assignor, they appear to be one transaction, as much as if the whole had been contained in the same deed. I must take it, that part of the consideration of the assignment was that there should be a reconveyance; in other words, the assignment was executed with an understanding that the family should be provided for by a gift of the house and lot. The condition imposed on all the creditors who had not executed the power of attorney was unreasonable; not only were they to release all demands, but also to leave it to the discretion of persons whom they had not chosen, to relinquish at their pleasure any portion of the property received from their debtors. This is going further than is warranted by the decisions of this or any other court. In *Lippincott v. Barker*, 2 Binn. 174 [4 Am. Dec. 433], it was held that an assignment of all the debtor's property, to be equally divided among all the creditors who should sign a release within a given time, was valid. The opinion of the court was restricted to the particular circumstances of that case, in which creditors, to a greater amount than the whole estate, as soon as they were informed of the assignment, agreed to accept it, and executed releases. If the Marshalls had made an absolute conveyance of their whole estate to any number of creditors whose debts were fairly equal to the estate, it would have been good, and those creditors might afterwards have done what they pleased with it. But that is not the case. Who can say that the assignment would have been executed, without the agreement to reconvey a part?

Very important consequences are involved in the decision of this cause. If the trust deed be supported, it will be an inducement for every insolvent debtor to insist on a provision for his family. And he will accomplish his object if he can but prevail on a number of creditors who have debts equal to his whole estate to accept his offer. There will not be wanting powerful motives to join in this scheme. Each creditor will reflect that if he refuse he may lose everything. What the law authorizes he has no reason to think unjust or immoral, and then even honest men may fall into a practice which, without any ill intention on their part, will be ratifying under the sanction of this court a system of fraudulent bankruptcy. It is no satisfaction to the excluded creditors to tell them that they have their remedy by actions against the defendant. Their actions are fruitless, because by the laws of Pennsylvania every defendant who surrenders his property for the use of his creditors

is discharged from imprisonment. But his wife and children are not obliged to surrender their property. If then we decide that the property is legally vested in the wife and children, it will remain to them, and the head of the family will nevertheless be entitled to his discharge. These are the considerations which have induced me to be of opinion that the assignment was void, so far as concerns those creditors who refused to accept it. Consequently the property in question having never passed from Charles Marshall was subject to the execution of the plaintiff, who is entitled to judgment in this ejectment.

YEATES, J. A legal objection has been raised to the plaintiff's recovery in this case, founded on his subscription in the sheriff's docket. He has paid only one hundred and forty dollars and sixty-nine cents, the amount of the costs of his action against Charles Marshall and son, and retained in his own hands the amount of the purchase-money. Suppose the amount of his debt and interest at the time of the execution of the deed to be two thousand nine hundred and sixty-two dollars and ninety-three cents, this sum added to the costs paid, there would remain one thousand eight hundred and ninety-six dollars and thirty-eight cents, to be paid by him out of the consideration money of five thousand dollars. I see no force in this objection. The sheriff has signed a receipt for the purchase-money, and has acknowledged the deed. He is therefore liable for the balance of one thousand eight hundred and ninety-six dollars and thirty-eight cents, to the party who may lawfully demand it. Should the plaintiff succeed in the present instance, he would become responsible to the sheriff under his written engagement. But should he fail therein, there could be no reason whatever to charge him with the balance. It cannot be pretended that while the wife and daughters of Charles Marshall hold and enjoy the premises in question, the purchaser at the sheriff's sale should, after losing his debt and costs, pay him the surplus of the purchase-money. More serious difficulties arising from the peculiar circumstances of this case occur to our consideration. [His honor here particularly stated the facts.]

The doctrine of assignments executed in favor of creditors by an insolvent debtor has been much agitated, and has undergone the full consideration of this court in the late cases of *Wilt v. Franklin*, 1 Binn. 502 [2 Am. Dec. 474]; and of *Lippincott v. Barker*, 2 Id. 174 [4 Am. Dec. 433]. In the last case it was held by a majority of the court, that an assignment by a

debtor of all his property to trustees, for the benefit of such creditors as should, within four months, execute a release of all demands, was good, provided certain creditors agreed to accept it on that condition. I see no cause to recede from my opinion delivered in that case. I freely admit, that independently of the bankrupt laws, a debtor may prefer one set of creditors to another, and that such a measure would neither be illegal nor immoral. The present case goes much farther. From the internal evidence, which the two powers of attorney, the deed of assignment of the fourteenth February, and the release of the trustees of the next day, carry with them independently of the circumstance of the two last deeds being attested by the same witnesses, I am constrained to conclude that the assignment was made in full and perfect confidence that Mrs. Marshall and her daughters should receive the provision contained in the release, and that this was the great leading motive to make the assignment. The creditors, at their first meeting, directed the assignees whom they had chosen to report the measures best for themselves and also for Charles Marshall and son. The powers of attorney contemplate a compromise of mutual interest, and the proviso in the conclusion of the conveyance to the trustees, shows manifestly the sense of the parties on the whole transaction. I therefore consider the assignment and release, though purporting on the face of them to be made with an intervening day, as contemporaneous acts depending on each other, and in fact as one instrument. Of course the question, in my view of it, is reduced to a single point, whether the assignment and release, under these circumstances, can legally bar such creditors as refuse to accede to those measures.

It has been urged that one or more creditors may legally accept of an assignment of the whole or any part of the estate of their debtor in payment of their demands, provided it does not exceed in value the amount of his or their debts; and that being so entitled, they may convey it to whom they think proper. This is not that case. The terms held out to the creditors are unreasonably hard and severe. Unless they would surrender up their undoubted individual right of judgment, and subscribe the letter of attorney giving a *carte blanche* to the assignees, ratifying the trust for the wife and children of Charles Marshall, they are excluded from any participation of the dividends. This appears to me to be a species of compulsion. I have no doubts that the most humane feelings for an unfortunate family, induced this arrangement; but my moral sense imperiously dic-

tates to me that until the debts of the head of the family are paid, his relatives cannot justly entitle themselves to any portion of his property.

The trust created by the assignees is certainly valid against the subscribing creditors, who by their subscription have assented to their acts. With their own property they might do as they pleased, and were under no control. But a composition made in order to exempt any part of the property from creditors, who might refuse their assent to the proffered terms, seems to me unavailing as to the dissenting creditors, and taints the whole transaction. *Lippincott v. Barker* was professedly decided by the majority of the court, under the peculiar circumstances of that case. From the facts here shown, I am fully satisfied that a trust for the family of Charles Marshall was originally intended by many of the creditors, which I cannot conceive binding on those creditors who have been unwilling to authorize that measure. I am not prepared to say, nor is it necessary that I should express an opinion, whether the humane views of the creditor might not have been effectuated in some other mode, or whether it could be done legally. The object of the assignment has ceased; the debts of the subscribing creditors have been fully released by their attorneys in fact, constituted for that purpose with full and ample powers. Consequently the premises in question reverted in the former owner as to non-subscribing creditors, and were liable to their execution.

I am therefore of opinion that judgment be entered for the plaintiff, to be defeasanced by the payment of principal, interest and costs of the two judgments entered for the plaintiff and John Erskine against the defendant, in conformity to the terms proffered by his counsel in the course of the argument.

BRACKENRIDGE, J. The following discourse, which I have found amongst my papers, would seem to have some bearing on the case before us. It is part of a sermon from the sixteenth chapter of St. Luke's Gospel, beginning with the first verse:

"There was a certain rich man which had a steward, and the same was accused unto him that he had wasted his goods. And he called him and said unto him, How is it that I hear this of thee? Give an account of thy stewardship, for thou mayest be no longer steward. Then the steward said within himself, What shall I do? For the lord taketh away from me the stewardship. I cannot dig, to beg I am ashamed. I am resolved what to do, that when I am put out of the stewardship, they may receive me into their houses. So he called every one

of his lord's debtors unto him, and said unto the first, How much owest thou unto him our lord? And he said, An hundred measures of oil. And he said, Take thy bill and sit down quickly, and write fifty. Then he said to another, And how much owest thou? And he said, An hundred measures of wheat. And he said unto him, Take thy bill and write fourscore. And the lord commended the unjust steward, because he had done wisely; for the children of this world are in their generation wiser than the children of light. And I say unto you, Make you friends of the mammon of unrighteousness, that when ye fail they may receive you into everlasting habitations. He that is faithful in that which is least, is faithful also in much; and he that is unjust in the least, is also unjust in much. If, therefore, ye have not been faithful in the unrighteous mammon, who will commit to your trust the true riches? And if ye have not been faithful in that which is another man's, who shall give you that which is your own? No servant can serve two masters; for, either he will hate the one and love the other, or else he will hold to the one and despise the other. Ye cannot serve God and mammon."

This steward was an insolvent man, who was unable to pay over to his lord the moneys which he had received, and for which he had become his debtor. He cast himself, therefore, about to settle the account in collusion with the debtors of his lord. The lord commended the unjust steward; not, it is to be presumed, because he was unjust, but because he was necessitous. "He had done wisely" for that occasion, and not what the children of light would do, but not more wisely for all times than the children of light would do; for I will venture to say, his lord would never trust him again.

In our day, and in this generation, the children of this world think themselves wise in defrauding their creditors, and doubtless they exhibit no small share of worldly wisdom in the devices to which they resort in accomplishing that object. But, my brethren, I take it there is but a shade of difference in law, and none at all in conscience, between highway robbery, and the compelling a creditor to take less than his due, at the same time, that by any contrivance, or, as the lawyers call it, shift or chevisance, you save something for yourself.

So far the divine. Would not the moralist say the same thing? For what is religion but morality, with a sanction drawn from a future state of rewards and punishments? Would not the jurist say the same? For what is law but the enforce-

ment of justice amongst men? The *reddere suum cuique* is the definition of justice. Would not the politician say the same? For the happiness of the social state is but an aggregate of individual happiness, and this depends upon the moral rectitude of each one of the community. An honest man may not be able to pay his debts, owing to misfortune, or to disappointment in his calculations. But no honest man or child of light, as the divine would say, would withhold the rag upon his back, or upon that of his child, if the creditor who has a demand against him would insist upon pulling it off. He would not conceal a rag, or annex a condition to the surrender of it, that the creditor should release all further claims on the future rag which he might acquire by his labor and industry in life. But not so with insolvent debtors. They take the benefit of the act, and make a surrender of their effects upon oath, but there are few instances where there is not reason to suspect that there is concealment in the surrender which they make, and this, from the evidence, that in most cases they are seen to emerge with sometimes not less and sometimes more ease of circumstances than before. As the heathen poet says to his mistress it may be said to the insolvent when he has taken the oath: *Simul obligasti perfidum votis caput, eniteas pulchrior multo.*

He is like the chrysalis that has cast its coat and taken wing; it shines away with a splendor which it had not before. In a proceeding towards creditors, independent of an insolvent act, I am unfavorable to the debtor making a bankrupt law for himself. An unconditional surrender of all his effects until his debts are paid, if he surrenders at all, is the only principle that can receive my sanction in a court of justice. There are decisions to the contrary in this court; but it will require a series of decisions by men of different educations and habits of thinking, before I can yield to them. If these decisions are founded in nature and truth, they will prevail; if not, they will go by the board. *Commenta hominum delet dies, judicia naturæ confirmat.*

At the same time that I thus withhold my assent to these decisions, I am far from inculcating an unfeeling disposition towards debtors. I say to the debtor do justice to the creditor; love, mercy and this, is the language of the scripture. But I hold it the duty of the debtor to surrender himself to the humanity of the creditor, and not to attempt to take an undue advantage of his situation as a creditor, and to impose terms. And this will be found in the end to be the wisest course for

the debtor himself, even with a view to his getting forward again in the world, notwithstanding what is ironically said in the text of the sermon, from which I have given an extract. And that it was ironically said in the opinion of the divine whom I have quoted, will appear from the concluding sentence of his discourse: "My brethren," says he, "to conclude, the children of light who are thought fools, are in reality wiser than these children of the world." An unfortunate and insolvent man who acts fairly, will in ninety-nine instances out of a hundred find a better account in the credit of integrity which he will establish than in concealment, or a compulsory acceptance of a part for the whole on the part of the creditors. For if there were not a generosity in man, there is a secret operation of providence which attends and blesses the industry of the honest. It is the language of the scripture: 'I have been young and now am old, yet have I not seen the righteous forsaken, nor his seed begging bread.'"

In the case before us, I am of opinion for the plaintiff, and upon this principle, were there nothing else in the case, that the term of a release was coupled with the surrender, and that time was given for creditors to come in, who might be willing to accept and give a release, which was to the delay of other creditors, who might choose to go on, and recover against the debtor. I consider it as a principle that ought not to be endured or made a part of the law.

Judgment for plaintiff.

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The opinion of Brackenridge, J., is here inserted, not so much for its value as an indication of his style, which, to say the least, is certainly unique. This will show my reason for the omission heretofore of the opinions of this learned judge.

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## MILNE v. MORETON.

[6 BINNEY, 353.]

**ASSIGNMENT UNDER FOREIGN BANKRUPT LAW.**—An assignment by commissioners of bankruptcy in England, does not prevent an attachment of the bankrupt's effects by an American creditor.

**WRIT** of error to reverse a judgment obtained by Moreton, the plaintiff, in the district court. The opinion states the case, and reviews the cases cited by counsel.

*Ingersoll, Montgomery and Binney*, for the plaintiff in error.

*Rawle, N. Chauncey and Chauncey*, contra.

TILGHMAN, C. J. Moreton, the plaintiff below, claims under an attachment against the effects of Topham, a merchant residing in England. A commission of bankrupt had issued against Topham in England, and the commissioners had made an assignment of his estate prior to the issuing of the plaintiff's attachment. The question is whether the plaintiff can hold the bankrupt's effects against the assignees under the commission. The counsel for the defense rest their defense on two points: 1. That the contract having been made in England, the case must be decided by the law of England; 2. That by the assignment an equitable interest passed to the assignees, which will be protected against an attachment.

1. Although the transaction from which the plaintiff's claim arises, originated in England, yet the business was to be done in America. The plaintiff, residing in New York, advanced money in England, and Topham, to whom the money was advanced, made a consignment of goods to the plaintiff. The goods were to be sold, and the plaintiff's advance being deducted from the proceeds, the surplus was to be remitted to Topham, in England. But it turned out that the proceeds fell short of the money advanced, so that, contrary to expectation, the plaintiff remained the creditor at the winding up of the concern. Under these circumstances, it cannot be said that the parties looked to the law of England; and if they did not, there is no pretense for having recourse to that law. If a contract is made in one country with a view to its execution in another, it shall be governed by the law of the country where it is to be executed. Such was the opinion of Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1079, in his reasoning in the case of a bill of exchange drawn in Paris, payable in London; and the principle is correct, because it is the intention of the parties which should decide by what law they are to be governed. Where this intention is not expressed, it may be reasonably concluded that they resort to the law of the country where the contract is to be carried into effect. But even if it had not been the intention to transact the business, relative to the contract, in America, I do not consider the principle of the *lex loci* as applicable to the case, because the dispute arises not on the construction of the contract, but on a collateral matter.

In general a contract is said to be expounded according to the law of the country in which it is made; but here is no question about the contract, the controversy is concerning property of the debtor totally unconnected with the contract. In many

respects the law of the country where the action is brought must prevail. It will not be pretended that the defendant, an English merchant, could plead the British statute of limitations in bar of the plaintiff's action. So, if the *lex loci* gives particular privileges to certain classes of people, they lose them when they go out of the territory where the privilege exists. In France, a merchant is not liable to imprisonment in actions of debt, except in certain cases. This law was pleaded here by a French merchant, on a motion to be discharged on common bail in an action on a contract made in France; but the plea was overruled. If the law of England is to govern the case before us, then it must govern not only the construction of the contract, but every other question which arises in the prosecution of the suit, a proposition too extravagant to be contended for. We must decide, then, according to our own law.

2. The second question is not so easily answered. It has never been decided in this state, and is of great importance, both as it respects our national character, and the amount of property depending on it. The assignees of Topham stand upon this principle, "that personal property has no locality, but is transferred according to the law of the country in which the owner is domiciled." This proposition is true in general, but not to its utmost extent, nor without several exceptions. In one sense personal property has locality, that is to say, if tangible, it has a place in which it is situated, and if invisible (consisting of debts), it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage, by making such property subject to regulations which suit their own convenience. In cases of intestacy, the property is distributed according to the law of the domicile of the intestate. But yet, so far as concerns creditors, it depends on the law of the country where it is situated. If an Englishman dies and leaves property here, we regulate the order in which his debts shall be paid, according to our own law; the residue is distributed according to the law of England, and the English adopt the same rule with regard to foreigners leaving property in England. Every country has the right of regulating the transfer of all personal property within its territory, but when no positive regulation exists, the owner transfers it at his pleasure.

We have no laws prohibiting foreigners from the free disposal of their personal property situated here. Therefore, if Topham had made an assignment of his property, in the hands of the

garnishee, the case would not have admitted of a moment's speculation. For although in strict law a chose in action is not assignable, yet it is in equity, and an equitable assignment made *bona fide*, and for a valuable consideration, will be protected against an attachment. This assignment, however, was not made by Topham, but by certain commissioners appointed by the lord chancellor, according to the law of England, which it is contended is equivalent to an assignment by himself, because every man is supposed to consent to the law of his country. An assignment by law has no legal obligation out of the territory of the law-maker. But by the courtesy of nations, founded on principles of mutual convenience, the laws of one country are sometimes regarded in another. The extensive commerce of England has scattered the property of her subjects all over the globe, and brought much of the property of foreigners within her own territory. Of consequence, questions have often been brought before her courts concerning the operation of her own bankrupt laws in foreign countries, and the effect of foreign bankrupt laws on property in England.

With respect to assignments under the English law, they never were held to operate as legal transfers of property out of England, not even in Scotland, Ireland or the colonies of America: *Cleve v. Mills*, 1 Cooke, 308. Nor has it been denied that an inhabitant of one of the colonies, who has obtained judgment and execution against the effects of a bankrupt under a law of the colony, may hold against the assignees in England: *Waring v. Knight*, 1 Cooke, 407. But if an inhabitant of England attaches the property of an English bankrupt in foreign parts, and thus obtains payment, he will be compelled to refund the money in an action by the assignees: *Sill v. Worswick*, 1 H. Bl. 665; *Philips v. Hunter*, 2 Id. 402; *Hunter v. Potts*, 4 T. R. 182; because residing in England, and bound by the law of his country, it is against equity that he should defeat the object of that law, which is the placing of all creditors on an equal footing. As to assignments under foreign bankrupt laws, it was determined in the year 1764, in *Solomons v. Ross*, 1 H. Bl. 331, and *Jollet v. Deponthieu*, 1 Id. 132, that the curators under a *cessio bonorum* in Holland should be preferred to English creditors who attached the property of the bankrupt in London.

No case has arisen between assignees under a commission in the United States, and English creditors claiming under an attachment; but it has been decided in the case of *Smith v. Buchanan*, 1 East, 6, that a discharge under a commission of

bankrupt in the United States, was no bar to the action of an English creditor for a debt contracted in England, and in *Pedder v. McMaster*, 8 T. R. 609, the court of king's bench refused to enter a *exoneretur* on the bail-piece, although the defendant had been discharged under the bankrupt law of Hamburg, where he resided when the debt was contracted. It is true that the English judges have often said, in general terms, that assignees under foreign commissions were permitted to bring actions in England, and Lord Loughborough, in particular, has contended for this principle in strong terms, and declared that although foreign nations were at liberty to pay no more regard than they thought proper to assignments under commissions in England, yet to disregard them would show a want of good policy and civilization: *Sill v. Worswick*, 1 H. Bl. 693.

Yet it must be confessed that between countries situated at a great distance from each other, the subject is attended with considerable difficulties. This is felt by the English courts as well as our own; for in neither is a discharge under a foreign commission, considered as a bar to an action, and yet it would seem that in order to act with consistency, complete effect should be given to the foreign commission, which is not done while the bankrupt remains liable to an action. It was at one time supposed that this complete effect should be given; for in *Pedder v. McMaster*, the opinion of Lord Mansfield is said to have been given in the case of *Ballantine v. Golding*, as follows: "It is a general principle that where there is a discharge by the law of one country, it will be a discharge in another." But when the principle came to be reduced to practice, it was found to be too extensive, and has been rejected in latter times, as appears by the cases which have been cited.

In this state we have permitted English assignees to bring actions in the name of the bankrupt for their own use, and we have held that between British subjects a discharge under an English commission is a bar to an action here: *Harris v. Mandeville*, September, 1796. But this is the first case in which there has been a collision between the English assignees and our own citizens claiming under an attachment. Neither do I know that an action of the kind has been directly decided in any state northward of Pennsylvania, although in the supreme courts of Massachusetts and New York it has been said in general terms that an assignment by commissioners in England is equivalent to a voluntary assignment by the bankrupt himself. In Maryland the law has long been settled: *McLane's case*, 1

Har. & McHen. 236; *Wallace v. Patterson*, 2 Id. 463. The assignment of the commissioners has no validity there against an attachment. If we are to give effect to an English commission in preference to an attaching creditor, I do not perceive on what ground we can refuse to adopt the principle of relation by which the property is divested from the bankrupt and vested in the commissioners from the time of the commission of the act of bankruptcy. And yet this would be attended with inconvenience too great to be endured; I am forcibly struck too with the injustice of permitting foreign assignees to take the bankrupt's property from this country, leaving the bankrupt exposed to actions of his creditors here. This is not giving effect to the whole system, but maiming and deforming it; for while the bankrupt is compelled on pain of death to make a fair surrender of all his property, it is intended to compensate him by a complete discharge from his debts.

As it seems impossible, therefore, consistently with former decisions, to adopt the proceedings under the English commission, according to the spirit and intent of their law, and it appears that the English courts find the same difficulty in giving full effect to commissions of bankrupt in the United States, it is at least questionable, whether consulting the real convenience of both countries, it would not be best, to leave creditors to their remedy by attachment, permitting the assignees in other respects to have the benefit of the commission. But whatever might be my own opinion of the policy, which an enlightened nation should pursue, I should find no small difficulty in deciding this case, were it not for the authority of the supreme court of the United States bearing directly upon the point. In the case of *Harrison v. Sterry*, 5 Cranch, 289, there were conflicting claims between—1. The assignees under an English commission; 2. Creditors in the United States who had laid attachments subsequent to the act of bankruptcy in England, but prior to the assignment by the commissioners; and, 3. Other creditors who had issued no attachment. The attachment creditors were preferred to the other two classes, and the residue which remained after satisfying them, was distributed so as to put all the creditors, as nearly as possible, on an equal footing, without paying any particular regard to assignees under the English commission. I think it safest to rest on this authority, and am, therefore, of opinion that the plaintiff is entitled to hold under his attachment against the claim of the English assignees. Of consequence the judgment of the district court should be affirmed.

YEATES, J. I feel little difficulty in declaring my sentiments, that the present question is not to be determined by the laws of Great Britain, excluding other systems of jurisprudence, and particularly our own political institutions. The *lex loci* forms a rule for the exposition of contracts, and in many cases governs exclusively, but not when made in one country to be carried into execution in another country.

Here the original contract was made in England. Topham, a British subject resident in England, transmitted to the plaintiff, Moreton, an American citizen resident at New York, a quantity of goods through Moreton's agent in Liverpool, to be sold on commission, and received from the agent an advance in money on account. It turned out in the event, that the sum so advanced exceeded the net proceeds, on the sale of the goods, and the foreign attachment issued for the recovery of the balance. Now it is perfectly clear, that until the sale of the merchandise were finished in New York, and the concern there wound up, it could not be ascertained which of the parties was indebted to the other, nor what would be the precise balance between them. Although the transaction, therefore, commenced in Liverpool, it necessarily terminated in New York, and in this latter place the debt arose. This, in my idea, removes every consideration as to Liverpool being the place whose laws must guide our decision.

But another question presents itself more difficult of solution. Shall the mere prior assignment of the effects of a bankrupt, in Great Britain, by the commissioners there, prevail against the attachment of an American citizen laid upon the effects of the bankrupt in the United States? It is highly important, inasmuch as it involves our national character, and deeply interests every American trader. I have, therefore, given the subject every consideration in my power; and if the opinion I have formed shall be found to be erroneous, I cannot shelter myself under the pretext of inattention to the subject of inquiry.

The municipal laws of all kingdoms and countries have no binding force beyond their respective limits. Such regulations are purely territorial in their effect. It is not pretended that the English statutes of bankruptcy have a strictly legal operation in the United States. The claim of preference in this instance in favor of the assignees is grounded upon what is called the comity of nations. A bankrupt, in the eye of the law, from whatever source his misfortunes may have arisen, was anciently

supposed to be criminal, and the system of bankruptcy has always been considered of a penal and confiscatory nature. The English books treat their statutes of bankruptcy as merely local, and confined in their operation to that particular portion of the kingdom called England, not extending to their dominions abroad, nor even to Scotland in their full vigor. The assignment of the property of a bankrupt is a statutable conveyance for the benefit of his creditors generally, in proportion to their debts, and is co-extensive with the power of the legislature.

In two late cases, in England, *Hunter v. Potts*, 4 T. R. 182; and *Sill v. Worswick*, 1 H. Bl. 665, it was decided, that if, after the assignment of the bankrupt's estate, a British creditor knowing it, and residing in England, should attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use. Another determination of the like nature took place in the chancery of Ireland previously, between *Neal v. Cottingham*, 1 H. Bl. 132, note. The grounds of these decisions were, that the parties who had laid the attachment were British subjects, and during the progress of the business lived in England, and, of course, were bound by the laws of that kingdom, to which they must be presumed to have given their assent. Such persons, therefore, were not permitted to avail themselves of proceedings which enabled them to counteract a general system of municipal jurisprudence, calculated for the common benefit of all the creditors.

This court adopted a similar principle in the cases of *Harris v. Mandeville*, and *McGuire v. Mandeville*, in September term, 1796, when they determined that a discharge by the bankrupt laws of England should protect the person of the bankrupt from bail in this state, where the plaintiffs were British subjects; and where the bankrupt had been held to special bail, an *exoneratur* was directed to be entered. But I am not aware of any instance in the United States, wherein common bail has been ordered in a suit instituted by an American citizen, against one who has been declared a bankrupt, and obtained his discharge under the laws of a foreign country. It has been adjudged by this court, that where one has been arrested, who had been discharged under an insolvent law of our sister state of New York, whose courts do not respect discharges under our bankrupt or insolvent laws, he shall not be discharged on common bail: *Fisher v. Hyde*, September term, 1801. The same principle has been pursued, where a discharge had been obtained in the district of Columbia, under the insolvent act of congress: *Walsh v. Nourse*, 5 Binn. 381.

But where a sister state acknowledges the effect of a discharge under our laws, no bail is required by us on the discharge of a defendant by the laws of such state: *Hillard v. Greenleaf*, 5 Binn. 336, note; *Boggs v. Treackle*, Id. 332. And in England, B. R. will not order an *exoneratur* to be entered on the bail piece, upon the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there. The court distinguished it from the case of *Ballantine v. Golding*, where it did not appear that both parties resided in England, whereas in the case then before them, the plaintiff was resident in England: *Pedder v. McMaster*, 8 T. R. 610.

In *Smith v. Buchanan*, 1 East, 11, it was resolved, that a discharge under a commission of bankrupt, is no bar to an action for a debt arising in England against the bankrupt, by a creditor, an English subject, although the courts there so far give effect to foreign laws of bankruptcy, as that assignees of bankrupts deriving titles under foreign ordinances, are permitted to sue in England for debts due to the bankrupt's estates; because the right to personal property must be governed by the laws of that country where the owner is domiciled. And in *Potter v. Browne*, 5 East, 131, Lord Ellenborough says, "we always import together with their persons, the existing relations of foreigners as between themselves, according to the laws of their respective countries; except, indeed, where those laws clash with the rights of our own subjects in England and one or other of the laws must necessarily give way, in which case our own is entitled to the preference."

In *Sill v. Worswick*, already cited, Lord Loughborough, in 1 H. Bl. 693, says: "It by no means follows that a commission of bankrupt has an operation in another country against the laws of that country. I do not wish to have it understood, that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws, nor affected by them, obtaining payment of his debt and afterwards coming over to this country would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignees, though I must presume that determination wrong, yet I do not think that my holding a contrary opinion would revoke

the determination of that country, however I might disapprove of the principle on which the law so decided."

The case now before us presents to our view these important prominent features. The defendant in error was an American citizen, resident in New York, where and when this debt arose in my idea. The parties now stand on their several legal rights; and the question, therefore, is narrowed down to one point, shall the assignment of the commissioners in a foreign country prevail in such a case against the attaching creditor here?

Much reliance has been placed by the counsel of the plaintiff in error on *Solomons v. Ross*, 1 H. Bl. 131, note a; and *Jollet v. Deponthieu*, Id. 132, wherein the *cessio bonorum* of a bankrupt in Holland was preferred to a subsequent attachment laid on the bankrupt's effects in England. The first case carries the doctrine to an unwarrantable extent, by applying the relation to the time of the Deneufville's stopping payment, and not to the time of the chamber of desolate estates taking cognizance thereof, which relation is not justified by the laws of Holland, where the bankrupt's effects vest in the curators, from the time of their appointment: 1 H. Bl. 132, note; Cooke's Bank Law, 307. Although these cases be considered as law, I think they may be distinguished from that before us. The *cessio bonorum* in Holland follows the Roman law, and is made by the bankrupt himself: Beaw. Lex. Mercat. 608, 612, 4th ed. Instructions of the states of Holland and West Frize to the commissioners of desolated estates: Art. 38; 2 Bl. Com. 473. But the assignment was made by the commissioners under the provisions of municipal regulations merely territorial. It is one thing to assert that assignees of bankrupts under foreign institutions should be allowed by the courtesy of nations to support suits, as the representatives of such bankrupts, for debts due to them; and it is another thing to give efficacy to those institutions, to cut out attaching creditors, although posterior in point of time, who have commenced their proceedings under the known laws of the government to which they owed allegiance, and from whom they were entitled to protection.

It was remarked during the argument that no good reason can be assigned why an assignment by the bankrupt himself should prevail, and not the present one, as made by the commissioners, which ought to be considered as equivalent thereto, and be deemed a voluntary conveyance made by the bankrupt himself, for a valuable consideration. The difference appears to me sufficiently obvious. Effect is given to the fair assignment

of the bankrupt himself, because it is the spontaneous act of the party having the full dominion over the property, transferring an equitable if not a legal title thereto, after which his interest therein necessarily ceases, and is no longer subject to an attachment.

It is wholly superfluous to cite Justinian, lib. 2, tit. 1, s. 40, to show that nothing is more conformable to natural equity, than to confirm the will of him who is desirous to transfer his property to another. But effect cannot be given to the assignment by the commissioners, unless we adopt the British statutes of bankruptcy as laws binding on ourselves, although they were not considered to affect us when we were the colonies of Great Britain; and this, too, when their operation would manifestly interfere with the interests of our own citizens. It may also be asked in return, Why shall this statutory assignment have the efficacy of vesting in the assignees the effects of the bankrupt, however distant, and thus protect them against foreign creditors who have neither received nor even claimed dividends under the commission, and yet a regular certificate of full conformity to the statutes shall not protect the person of such bankrupt from arrests in our courts, at the suits of such creditors? It was not pretended, on the first argument, that the doctrine of relation to the act of bankruptcy committed, which is expressly enacted by the British statutes, can possibly hold here, operating on goods or effects within the United States; and yet, if those statutes, on the ground of want of locality of such goods or effects, are to be operative, they should be extended in their full force, without limitation to their effect. The attachment, at the suit of an American citizen, brings in the foreign bankrupt; but if the latter enters special bail, he cannot plead his discharge in bar of the demand. Shall we recognize the act of the commissioners in Europe as effectual to transfer a debt incurred in the United States, and thereby deprive the creditor of all hopes of enforcing payment of his demand in our tribunals?

That anxiety has been shown by British judges to extend the operation of the British statutes of bankruptcy beyond the kingdom of England, and particularly by Lord Loughborough in *Sill v. Worswick*, 1 H. Bl. 690, I will not deny. The general tendency of the cases is, that British subjects, although resident abroad, are bound by the laws of their own country; and I have no objection to the doctrine, confined within those limits. The two cases on which, in point of authority, the plaintiff's

strength lies, are *Solomons v. Ross*, and *Jollet v. Deponthieu*, before cited. On the most diligent search, I can find no other adjudications which go to the same extent, as to the effect of foreign ordinances; and the principle of those cases seems impugned by other decisions.

In Scotland, it is observed by Lord Kames, in his *Principles of Equity*, p. 363, 2d Ed., that the statutory transference of property, even from the bankrupt to the commissioners, cannot convey any effects in that kingdom, although the English statutes are not there totally disregarded. In *Cleve v. Mills*, 1 Cooke's Bank. L. 303, 4th Ed., Lord Mansfield said that the statutes of bankrupt did not extend to the colonies or any of the king's dominions out of England; the assignments under such commissions took place between the assignee and the bankrupt, but did not affect the rights of any other creditors. This was settled in many cases, and particularly in *Wilson's bankruptcy*, wherein Lord Hardwicke declared that the creditors had a right to affect the estate in Scotland, and get the advantage of the general creditors, notwithstanding the commission in England, although he would not permit them to come in under the commission till the other creditors were made even with them. *Wilson's case* is also mentioned with approbation in *Waring v. Knight*, Id. 307; and in *LeChevalier v. Lynch*, Doug. 161, 170, wherein it was adjudged that money owing out of England to a bankrupt, might be attached by the law of the place after the bankruptcy, for a debt due before the bankruptcy.

In *Hunter v. Potts*, 4 T. B. 190, the defendant's counsel puts the very case now before us as not admitting of doubt; and the court do not appear to deny the correctness of remarks. "If," says he, "a subject of Rhode Island had been a creditor of the bankrupt, it is not to be supposed that the courts of law would have turned him round to seek his remedy under the commission in England, if even after the commission here issued he had attached the property of the bankrupt there."

In *Maudesley v. Park and Beckwith*, assignees of Campbell and Hayes, cited by Serjeant Hill, *arguendo* in *Sill v. Warwick*, before mentioned, and stated at large in 1 H. Bl. 680, it was held by the lords commissioners Smythe and Bathurst at Lincoln's Inn Hall, December 13, 1779, that the assignment of the commissioners did not divest the property out of the bankrupt, as the debt was due in Rhode Island, but only gave the assignees a right to sue for it, who having commenced a suit first,

and recovered judgment there, had gained a priority over the defendants; and this, although the case of *Solomons v. Ross*, and *Jollet v. Deponthieu*, are admitted to have been decided differently.

And in *Smith v. Buchanan*, 1 East, 11, before cited, Lord Kenyon, after stating that assignees of bankrupts, deriving titles under foreign ordinances are permitted to sue in England for debts due to the bankrupt's estate, mentions the opinion of Lord Talbot, that though the commission of bankrupt issued in England, attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein.

In *Bush v. McClain*, 1 Har & McH. 236, the opinion of Daniel Dulany, esq., is given, wherein he distinguishes between plaintiffs resident in Great Britain taking out attachments against the effects of bankrupts in Maryland and country creditors pursuing the same measure, and the court acted on that distinction. And in *Wallace v. Patterson*, 2 Har. & McH. 463, where three persons residing in England became bankrupts, and had effects in Maryland, it was adjudged that an attachment would lie by a citizen of Maryland against one third part of the effects, to satisfy a debt due to him by one of the partners, and contracted in England.

I now proceed to the case of *Harrison v. Sterry*, adjudged in the supreme court of the United States in March, 1809, upon an appeal from a decree of the circuit court for the district of South Carolina, upon a bill in equity by Harrison for relief. The case in the circuit court is reported in Bee's Admiralty Decisions, 244, and on the appeal in 5 Cranch, 289. Six different classes of creditors claimed the effects in question: 1 Harrison, the complainant, under a deed from Robert Bird, in his own right, and as attorney of Henry Mertens Bird and Benjamin Savage, his copartners, dated third December, 1802, and on a similar instrument of writing without seal, signed by Robert Bird in behalf of the English and American firm, dated thirty-first January, 1803. These were considered as fraudulent acts on the bankrupt laws, being made in contemplation of bankruptcy, and consequently void. 2. The United States, who were consequently declared entitled to a priority under the act of congress of third March, 1797, sec. 5. 3. The American; and 4. British creditors who had attached the effects of the partnership in South Carolina on the second, fifteenth, sixteenth and twenty-third days of April, 1803. Robert Bird alone had

become a bankrupt under the laws of the United States, and his interest of one third in the funds of the company was unaffected by the attaching creditors, but passed to his assignees, subject to the claim of his copartners upon a settlement of accounts. The lien of the attaching creditors upon this one third was removed by the bankrupt law of the United States. 5. Sterry and others, assignees of Henry Mertens Bird and Benjamin Savage, under a British commission of bankruptcy. The bankruptcy of Bird, Savage and Bird in London was declared on the twelfth of June, 1803, and a commission issued. On the sixth of February, preceding, they had stopped payment. 6. Aspinwall and other assignees of Robert Bird claimed under an American commission of bankruptcy. The house under the firm of Robert Bird & Co. stopped payment at New York on the fifth of December, 1803. Thomas Parker, who by consent of the creditors had been appointed an agent for all the parties concerned, to collect and receive the debts due to Bird, Savage and Bird, was also made a party in the appeal.

In 5 Cranch, 302, Marshall, chief justice, thus expresses the opinion of the whole court: "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments." It has been contended by the counsel for the plaintiff in error, that the word "legal," used in the preceding sentence is contra-distinguished from equitable, and must be understood in that sense. This does not appear to me correct, although I have had frequent occasion to lament the imperfection of human language, used by persons of the most discriminating minds, and habituated to accuracy of speech. It would seem wholly unimportant to distinguish between legal and equitable effects upon an appeal from a decree in equity on those effects, in the particular case. I know of no equity arising from a transfer under the foreign law, which does not arise *proprio vigore*. It is agreed that the expressions, however general, are to be referred to the circumstances of that case. I take the plain meaning of the words of the chief justice to be, that a foreign law cannot transfer property in the United States, and this, I think, will most clearly appear from the conclusion of the decree: "With respect to any surplus which may remain of the two thirds after satisfying the United States and the attaching creditors, it ought to be equally divided among all the creditors, so as to place them on an equal

footing with each other. The dividends paid by the British assignees, and those made by the American assignees being taken into consideration, this residuum is so to be divided between them, as to produce equality between the respective creditors."

It is true, the attachments of the creditors were laid on the effects at Charleston, previously to the issuing of the English commission against Bird, Savage & Bird, but that house stopped payment in London, on the fifth of February, 1803. How comes it then that this commission did not effect an equitable transfer of the effects of the firm in the first instance, after payment of the debt due to the United States, by relation to the acts of bankruptcy in London, according to the doctrine asserted by the concluding counsel of the plaintiff in error? Or if the doctrine of relation is not contended for, according to the argument of the counsel who preceded him, how does it happen, that, after satisfying the United States and the attaching creditors, the residue was not ordered by the court to be paid over to the British assignees, if the effects were equitably transferred by the British commission upon the principle of comity? Why are all the creditors put upon an equal footing? I know of no satisfactory answers which can be given to these questions, unless on the concession that the bankrupt law of a foreign country is incapable of operating any transfer, whether legal or equitable, of property in the United States. I have been thus minute in my observations on this case, because it has had considerable effect on my mind in forming my judgment upon the subject before us. I regard it as a case in point, decided with unanimity in the highest court of the Union, to whose jurisdiction the interests of foreigners are peculiarly intrusted.

I admit that the American, as well as British, decisions assert that the assignees under a foreign commission of bankruptcy are considered as the substitutes of the bankrupt, and may support suits in their own names. As between the bankrupt and debtor this operation is fair, provided the debtor is made safe in his payment; but when it is extended further and thereby affects the rights of strangers, it assumes a different character. The British courts will not permit the subjects of that kingdom to contravene their bankrupt system; but unless in the two cases of *Solomons v. Ross* and *Jollet v. Desponthieu*, I know of no decisions which attribute this extra-territorial effect to foreign laws and institutions.

I fully agree that we should pay sedulous attention to the comity of nations. Such courtesies tend to harmonize mankind, promote public convenience, and enlarge the circle of human happiness in a social state. But our complaisance should be confined to reasonable and temperate limits. At all events, I would be fully satisfied that the British courts sustain the doctrine contented for by the plaintiff in error, as to the effect of our own bankrupt system, before I give my assent thereto. Reciprocity in such instances is true equity as well as sound policy. That fact remains yet to be ascertained, and I avow my incredulity. Persons trading to England, and coming there occasionally, although not resident in that kingdom, may be declared bankrupts by their laws: Cowp. 402; 1 Atk. 82. It is well known that their practice has been conformable thereto. All intervening acts between the act of bankruptcy committed and the assignment by the British commissioners, as to the personal property of the bankrupt, are avoided by the English statutes: Cooke's Bank. L. 584. The effects of such a doctrine, operating on such property in a foreign country, are too obvious to require any detail. Persons feel the difficulty of proving debts under a commission of bankruptcy among ourselves. How much must it be enhanced, when those proofs are to be made in Great Britain, at the distance of a thousand leagues from the scene of the transactions. In times of war between the two countries, dividends would not be paid in England. My feelings are repugnant to sending our citizens to foreign tribunals to recover their debts, when full justice may be dispensed to them in their own country; and I can discover no uniform imperious rule which enjoins this hardship upon them.

Upon the whole, on the fullest reflection, I do not see my way sufficiently clear to subject our citizens to such embarrassments and inconveniences, upon the principles of a supposed comity; and I am therefore of opinion, that the effects in the hands of the garnishee were liable to the attachment of Moreton, notwithstanding the bankruptcy of Topham, and that the judgment of the district court be affirmed.

BRACKENRIDGE, J., concurred.

Judgment affirmed.

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For cases holding similar doctrine, see *Baker v. Wheaton*, 4 Am. Dec. 71; *White v. Canfield*, 5 Id. 249; *Smith v. Smith*, 3 Id. 410.

In *Speed v. May*, 17 Pa. St. 91, it is held that the *lex fori* controls the remedy as respects personal property, but the law of the domicile regulates its

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transfer. The doctrine of the principal case is affirmed and followed, Gibson, C. J., saying: "The principles of this case were discussed in *Milne v. Moreton*; in *Mullikin v. Aughinbaugh*, 1 Pa. St. 117, and in *Lowry v. Hall*, 2 Watts & S. 131, to which it is sufficient to refer for them. It will there be seen that an involuntary transfer of movable property abroad by process at home does not divest the title in prejudice of creditors domiciled at the place of the actual *situs*; but that a voluntary transfer by the act of the owner divests it everywhere. The legal *situs* follows the domicile of the owner, and the law of the actual *situs* protects the claims of domiciled creditors there only against transfer by operation of law."

As holding the same, the case is recognized in *Green v. Buskirk*, 5 Wall. 313.

Citing the principal case, Story, *Confl. Laws*, sec. 410, says: "It is admitted that the general rule is, that personal property, including debts, has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. But every country may by positive law regulate as it pleases the disposition of personal property found within it; and may prefer its own attaching creditors to any foreign assignee; and no other country has any right to question the determination."

In section 414, the same author cites the case as to how far comity between nations extends. In section 416, he refers to the principal case, and *Remsen v. Holmes*, 20 Johns. 229, and *Blake v. Williams*, 6 Pick. 286, as the three leading cases, upon the respective rights of attaching creditors, and assignees under foreign insolvent laws.

In section 428, he refers to the case, among many others, as to what laws govern the transfer of real estate, or immovable property.

## SHALLER v. BRAND.

[6 BINNEY, 435.]

**VALIDITY OF ACKNOWLEDGMENT BY FEME COVERT.**—Where a statute required the wife to make acknowledgment that she executed a conveyance without coercion or compulsion of her husband, and the certificate stated that "she, being of full age, separate and apart from her said husband, examined and the full contents made known to her, voluntarily consenting thereto;" it was held that this was a substantial compliance with the law.

**PROOF OF EXECUTION OF WILL.**—A will of land which has accompanied the possession thirty years, is evidence without proof of its execution.

**INTEREST ON JUDGMENT.**—A judgment upon which it is agreed that no execution shall issue until the plaintiff has perfected his title to certain land for which the bond that supported the judgment was given, carries interest.

**EVIDENCE OF RELEASE OF DOWER.**—If a writing be put in evidence in which there is an admission of the survivorship of the wife, and her being then living, and that she had released dower, it is evidence that the right of dower is extinguished.

**ERROR to the court of common pleas.** Brand brought an action of debt on a bond given by the defendants' intestate, in consideration of the conveyance of a tract of land to the intestate.

tate by plaintiff. Pending the action an agreement was filed not to issue execution on the bond until the title to the land should be perfected. Plaintiff derived title as follows: There was no dispute as to the title down to one V. Dillebaugh, who, by his last will, dated September 3, 1777, devised the land in equal parts to his sons, Valentine and Christian, and to his daughter Catharine in fee. In 1778, Valentine and Christian conveyed their share in fee to Yost Brand, who married Catharine; but Valentine's wife did not join in the conveyance. Yost Brand and his wife conveyed the premises to plaintiff by a deed in 1782, and acknowledged the same in 1808. The certificate set forth that the grantors appeared before the judge taking the acknowledgment, "and severally acknowledged the said indenture as their act and deed, and desired that the same might be recorded as such; she, the said Catharine, being of full age, separate and apart from her said husband by me examined, and the full contents made known to her voluntarily consenting thereto." The deed to Shaller was acknowledged by plaintiff and his wife.

The questions presented by the bill of exceptions were: 1. As to the admissibility in evidence of the will of V. Dillebaugh, it not appearing that it had been properly executed, nor had been exhibited for probate; 2. Upon the sufficiency of the acknowledgment to bar Catherine's right of dower; 3. As to whether there was an outstanding right of dower in Anne, Valentine's wife; and, 4. As to plaintiff's right to recover interest on the judgment.

*Fisher and Montgomery, for the plaintiffs in error.*

*Elder and Hopkins, contra.*

TILGHMAN, C. J. 1. The defendant contends that the plaintiff was not entitled to interest on the bond subsequent to the entry of the judgment, because the judgment was conditional or in the nature of an interlocutory judgment, and in its nature showed an intention to suspend the interest until the title was completed. But the judgment was neither conditional nor interlocutory. It was absolute, and the condition or restraint was annexed only to the execution. Whenever the title was perfected, the plaintiff had a right to take out execution, and the judgment being for the penalty of the bond, the plaintiff might cover under it his whole interest and costs. The jury did not give interest from the time of the judgment on the accumulated sum of principal and interest then due according to our act of

assembly, so that the defendant has no reason to complain of the least hardship, considering his case on equitable grounds. He was in possession of the land, the profits of which were equal to the interest of the money, and there was no evidence of his having kept the money lying dead for a single moment.

2. The next question is on the acknowledgment of a deed from Yost Brand and Catharine, his wife, to Christian Brand. The act of February 24, 1770, on which this point arises, directs that the judge who takes the acknowledgment shall examine the wife separate and apart from her husband, and shall read, or otherwise make known to her, the full contents of the deed; and if upon such separate examination she shall declare that she did voluntarily and of her own free will and accord, seal, and, as her act and deed, deliver the said deed, without coercion or compulsion of her husband, then the said deed shall be good and valid. It is insisted by the counsel for the defendant that the form prescribed by the law should be strictly pursued; but such has never been the opinion of this court. We have always declared that it was sufficient if the law was substantially complied with; and on any other principle of construction, the peace of the country would be seriously affected, as the certificates of acknowledgments of deeds have generally been drawn by persons who were either ignorant of or disregarded the words of the act of assembly. The law must be complied with, but in construing it we shall always be inclined to suppose a fair conveyance if possible. Now, it is here said that the wife was examined apart from her husband, that the contents of the deed were made known to her, and she voluntarily consented. It is not straining the expressions "voluntarily consenting thereto" too far to say, that they imply, she declared that she executed the deed voluntarily, and that is sufficient; for if the execution was voluntary, it was without coercion or compulsion. I am clearly of opinion, therefore, that by this deed the estate of the wife was legally conveyed.

3. The third question is on an outstanding title of dower in Anne Dillebaugh, supposed to be living in Canada. She is the widow of Valentine Dillebaugh, jr., who conveyed his interest in this bond to Yost Brand, the twenty-sixth of February, 1778. There was no proof of this woman's being, living or having any right of dower, except by a memorandum in the handwriting of Mr. Elder, in which memorandum it is also mentioned that she had released her right. The court of common pleas were of opinion that the contents of this paper must be taken alto-

gether, and in this they were certainly right, so that although it appeared that she once had a right of dower, yet upon the whole it appeared that she had no right, because she had released.

4. The last objection is to the opinion of the court in admitting as evidence a paper purporting to be the will of Valentine Dillebaugh, the elder, bearing date the third September, 1777, by which he devised the land sold by Christian Brand to Adam Shaller, to his sons Valentine and Christian, and his daughter Catharine equally in fee. There was no proof of this will, but it was admitted in evidence on the ground of its being a writing which had accompanied the possession of the land for upwards of thirty years. There is no doubt but that ancient deeds under which the possession has gone for thirty years, are evidence without proof of their execution, and it was decided in *Jackson v. Blanshan*, 3 Johns. 292 [3 Am. Dec. 485], that in similar circumstances a will also was evidence.

In that case the court differed in opinion as to the time necessary to bring a will within the rule of an ancient paper. Spencer thought that upwards of thirty years having elapsed from the date of the will, and possession having been held under it twenty-seven years, it might be read in evidence without proof. But Kent, chief justice, and a majority of the court were of opinion that it required thirty years possession; and I agree with them, because although the antiquity of the writing affords some evidence in its favor, yet the main ingredient is possession. Both, however, are necessary to raise that presumption which will justify the court in departing from the usual rule, which requires the production of the subscribing witnesses, or proof of their handwriting, after accounting for their absence. This will bore date thirty-five years before it was offered in evidence, the testator had been dead upwards of thirty-four years, articles of agreement for sale to the defendant had been executed by the plaintiff, who claimed under the will upwards of thirty years, and these articles had been followed by an actual conveyance the year next succeeding, so that possession had probably been held under this will between thirty and thirty-four years. The proof was not positive that the will had been among the title papers delivered to the defendant, nor was it ascertained with certainty at what time the title papers were put into the hands of the defendant. The court thought that sufficient evidence had been given to authorize them to permit the will to be read to the jury; and they

permitted it under this restriction, that unless the jury should be of opinion that possession had gone according to the will for upwards of thirty years, they should pay no regard to it.

The court had a right to judge upon the previous matter themselves; but I do not see that they did wrong in permitting the jury to judge of it, a reasonable foundation having been first laid. And it appears that such foundation was laid, both from the strong circumstance of possession held by the defendant himself, and from recitals in ancient deeds deducing title under this will. The testator left three children, two sons, Valentine and Christian, and one daughter, Catharine, the wife of Yost Brand. The two sons conveyed their interest to Yost Brand, by deed dated the sixth of February, 1798, in which it was recited that their father devised the premises to his three children equally by a will, duly proved and recorded in the county of Lancaster. But no such will has been found on record, so that there is a mistake in that part of the recital. The deed from the plaintiff to the defendant, also, recites the title as derived from the same will. These are very strong circumstances. When all persons interested in the estate, declared that the will was made particularly when the eldest son of the testator says so, who would have been entitled to one half of the land if his father had died intestate, there was surely a good foundation for suffering the paper to go to the jury in the manner that it went.

Upon the whole, I am of opinion that there is no error in this record, and, therefore, the judgment should be affirmed.

YEATES, J., concurred, except as to the question of the admission in evidence of the will of Valentine Dillebaugh. Being of opinion that the will went to the jury without the requisite proof in the first instance, on that ground alone the judge was in favor of a reversal of the judgment.

BRACKENRIDGE, J., delivered an opinion concurring with that of the chief justice.

Judgment affirmed.

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## BAILEY v. FAIRPLAY.

[6 BINKLEY, 450.]

**RECORD OF JUDGMENT IN EJECTMENT AS EVIDENCE.**—In an action for mesne profits, the record of the judgment in ejectment is conclusive evidence that the defendant was in possession at the time the ejectment was brought, and also as to title during the whole time laid in the demise, but it is not evidence of the length of time that the defendant was in possession.

ACTION for the mesne profits of certain lands recovered by Watson, Fairplay's lessor, against Bailey and others, in an action of ejectment. The only evidence produced of defendants' possession, was the record in the ejectment suit. From this it appeared that all the defendants had been served in that action, that they had appeared, pleaded not guilty, and subsequently appealed to the supreme court, where judgment had been entered against them all. It, also, appeared that the name of the casual ejector had not been struck off the declaration, and the names of the real parties in action inserted.

The jury were charged, that in this action the judgment in ejectment was conclusive evidence that the person, against whom judgment was recovered, was in possession at the time of the service of the declaration, and that this principle would apply in the present case, against the defendants, it appearing from the whole record that the verdict in the ejectment suit was not against the casual ejector. Defendants excepted to this charge.

*C. Smith and Montgomery*, for plaintiffs in error.

*Bowie and Hopkins*, contra, cited *Goodtitle v. Tombs*, 3 Wils. 121; 3 Bl. Com. 205; 2 Crompt. Pr. 206; *M'Cullough v. Guetner*, 1 Binn. 214; *Cooper v. Dale*, 1 Str. 532; *Orion v. Mee*, Barnes' Notes, 188; *Roe v. Doe*, Id. 181; *Rex v. Landaff*, 2 Str. 1011.

TILGHMAN, C. J. The exception to the charge of the president is that the jury were misled by it, because they were not told that the record was not evidence of the length of time for which the defendants were in possession, which ought to have been proved by other evidence. It has also been contended, that the record was not evidence against the defendants at all, because the issue appears to have been joined between the plaintiffs, and John Foulplay the casual ejector. I think there is nothing in the last objection, because it appears that notice of the ejectment was served on all the defendants, that they all appeared and entered into the common rule, that they all appealed from the circuit court to the supreme court, and that in the supreme court, judgment was entered against all. The omission therefore of striking the name of the casual ejector out of the declaration, and inserting the names of the defendants in the place of it, is not to be regarded. An amendment would have been granted on application to the court at any time, and viewing the whole record, this court perceives that judgment was finally en-

tered against the defendants, which is conclusive against them, and would be conclusive even if a writ of error were now depending before us, because we should consider it in the same light as if the error had been amended.

As to the possession, the record of the recovery in the ejectment certainly is conclusive evidence of the defendants being in possession at the time the ejectment was brought, because unless that had been proved the plaintiff could not have recovered. In order to recover in ejectment, the plaintiff must prove, first, that he had title at the time of the demise laid in his declaration; and, secondly, that the defendant was in possession at the time the suit was brought; and on proving these two things he is entitled to a verdict. As it is not material to the present question, I will not say positively, whether the plaintiff might not recover on proving that the defendant had been in possession some time before the commencement of the ejectment, and within the time laid in the demise, although not at the time of the action being commenced. But is he bound to prove that the defendant was in possession from the time of the demise? It is contended on the part of the plaintiff that he is. But I cannot understand on what principle this position can be supported. The plaintiff may lay the ouster committed by the defendant at any time he pleases, provided it is after the demise; but he is put to no proof of it. The tenant is obliged to enter a rule whereby he agrees to confess the ouster, before he is permitted to become defendant in the action. But as to the possession it is enough if the plaintiff proves the defendant to have had it at the time the suit was commenced. So that no inference can be drawn from the recovery in the ejectment as to the length of time for which the defendant has been in possession. Thus the law would seem to be on principle, and we shall find that the authorities are in conformity to it.

In *Aslin v. Parkin*, 2 Burr. 668, Lord Mansfield says in express terms, that, "as to the length of time the defendant has occupied, the judgment proves nothing." And in 2 Peake's Ev. 326, it is laid down as settled law, that in an action for mesne profits, after a recovery in ejectment, the plaintiff must prove the length of time the defendant has been in possession. To this the counsel for the plaintiff oppose what is said by Gould, Justice, in *Goodtitle v. Tombs*, 3 Wils. 121. The words are these: "It must be taken for granted in this case, that there was an actual ouster, and that the defendant kept him out from the time of the demise until the judgment in the ejectment." But

on examining this case, it will be found that the expressions relied on have no bearing on the point, because there was no question as to the length of time the defendant was in possession. It was action for recovery of mesne profits after judgments by default in an ejectment against Tombs, who was tenant in common with the lessor of the plaintiff; and the only question submitted to the court was, "whether one tenant in common could maintain this action against the other, to recover damage for the expulsion and mesne profits." This is the point, then, to which the general expressions of Gould are to be applied. As to the length of the defendant's possession, there was no dispute, it must have been either proved or agreed on at the trial. All that the court had to decide was, whether one tenant in common could recover in this action at all, taking for granted that the defendant had been in possession and received the profits. The same remark will be an explanation of the passages cited from Buller's *Nisi Prius*, and 3 Blackstone's Commentaries, 205, "that the judgment is conclusive evidence to recover mesne profits from the time of the demise." The meaning is, that it is conclusive as to title, for the whole time laid in the demise. But if the plaintiff would recover the profits beyond the time of the demise, the defendant may put him to prove his title, because the record only shows that he recovered the term mentioned in the declaration.

But it is objected that, be the law as it may on this point, the charge of the judge was not erroneous, because it was silent. This is very true, and it is also true that, in what the judge did say, he was correct. But still the charge upon the whole was incorrect; because, by stating only part of the law, the jury were suffered to fall into an error, by which the defendants were injured. The jury are to receive instructions from the court. If this instruction is given in such a manner as to mislead them, there is an error which ought to be corrected. The record contains the evidence and the charge to which the defendant's counsel excepted, and prayed that the charge might be reduced to writing, and filed according to the act in such case provided. As the whole charge is on the record, we must now take it that the whole is open to exception, although, if the judge had thought proper, he might have called on the counsel to point out the part to which he objected, and reduced that part only to writing.

On the whole it appears to me that there is error. I am,

therefore, of opinion that the judgment should be reversed, and a *venire de novo* be awarded.

YEATES and BRACKENRIDGE, JJ., concurred.

Judgment reversed.

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As showing that in ejectment, the lessee of the plaintiff and the tenant in possession are considered the real parties, the case is cited in *Goodall v. Marshall*, 14 N. H. 170.

Showing that the record of the recovery in ejectment is conclusive, its authority is affirmed in *Man v. Drezel*, 2 Pa. St. 209. In *Hole v. Rittenhouse*, it is cited to show that proof of actual possession by the defendant is necessary to sustain the action of ejectment; and to the same effect in *Sopp v. Wimpenny*, 68 Pa. St. 81.

See *West v. Hughes*, 2 Am. Dec. 539, as to the effect of a judgment in ejectment.

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## DRUM v. SIMPSON.

[6 BINNEY, 478.]

DECLARATIONS OF GRANTOR.—Declarations made by the grantor to the grantee after the execution of a deed of trust but before the grantee had accepted it, are evidence to alter or contradict the trust.

EJECTMENT. Both parties derived title from one Glass. Glass made a parol sale of the premises to one Speck, and he made a like sale to Drum, the defendant below, in 1796. In 1799, Glass, at Drum's request, conveyed the premises to Simon Snyder, who in November conveyed the same to the plaintiff's lessor, Simpson, in trust for the children of one Selin in fee. The defendant claimed an equitable interest and offered to prove, by the lessor of the plaintiff, that the Snyder trust deed was intended for the benefit of Drum and not for his injury, and that Drum was the owner of the land subject to a certain small sum due the estate of Anthony Selin. This evidence was rejected. The plaintiff gave in evidence against defendant's objection, a copy of a certain bond, the original being in the defendant's hands, canceled; notice having first been given to produce the same. The condition of the bond was for the conveyance of the property in question in trust for Selin's children. The defendant excepted to the rulings of the court.

Hall, for the plaintiff in error.

Duncan, contra.

TILGHMAN, C. J. [after reviewing the fact]: The first point for our consideration is, whether the copy of the bond offered

by the plaintiff was evidence? If the original bond would have been evidence, the copy was so, because the original was traced to the hands of the defendant, who had notice to produce it. It is said, indeed, that the original would not have been evidence, because it was canceled; but that it is no reason why it should not go in evidence, because it might be a question how it came to be canceled. Possibly Drum got hold of it and canceled it without authority; and if so it would have the same force as if uncanceled. This was a matter for the consideration of the jury. Although the legal title of the property in dispute was in the lessor of the plaintiff, yet both the children of Selin and the defendant Drum, thought it necessary to go into the equity of the case, and both claimed an equitable interest in the premises. It was, therefore, material to show that Drum had agreed to secure this lot to Mrs. Selin's children by her first husband. On this point I can see no difficulty. The court of common pleas were clearly right in their opinion.

The next exception was founded on evidence offered by the defendants and rejected by the court. The circumstance of Simpson's being a trustee and lessor of the plaintiff was not sufficient for the rejection of his testimony. It is said by Lord Hardwicke, in *Fotherby v. Tute*, 3 Atk. 604, that a trustee, though he has the legal estate, is considered as having no interest, and is examined by order of the court of chancery, every day. We have acted uniformly on this principle in our courts of law. The name of the trustee is used by the *cestui que trust*, who is liable for the costs of suit, and is in fact the only person interested.

But other objections are made to Simpson's testimony. It is said that a writing is not to be destroyed or altered by parol testimony, and that the declarations of Snyder, made after he had executed the deed ought not to be received. If these declarations had been made after the deed had taken complete effect, I think they would not have been evidence. But this is a very special case. At the time that Snyder is supposed to have made the declarations to Simpson, no consent had been given by Simpson to accept the trust, and it does not appear that without these declarations he would have consented to accept it. The deed, therefore, was not complete. A man cannot be compelled to accept a trust against his will. This conversation, therefore, between Snyder and Simpson, is substantially the same as if it had happened just before the execution of the deed; and it has been long settled in this court, that parol evi-

dence may be received to prove what passed before and at the time of execution of the deed, if the party offering the evidence alleges fraud or mistake in the transaction. I refer particularly to the case of *Thompson v. White*, and the authorities there cited, 4 Dall. 426 [1 Am. Dec. 252].

In another point of view, likewise, the evidence was admissible. The deed from George Glass to Simon Snyder is a conveyance of the legal estate, in consideration of twenty dollars, without mention of any trust; neither does it appear by any positive evidence that there was a secret trust attending this deed. Then the heirs of Selin, claiming under Snyder, would be affected by his declarations made before his conveyance to Simpson. But for the reasons I have given, Snyder's declarations are to be considered as having been made before the execution of the deed. They are therefore evidence. The case of *Scroggs v. Scroggs*, Amb. 272, bears a strong resemblance to the present. Power was given to Scroggs to make an appointment in favor of such of his children as he pleased, with the consent of two trustees. He prevailed on the survivor of these trustees to join in a deed making an appointment in favor of his youngest child, through false suggestions, injurious to the character of the eldest. The trustee was admitted as a witness to give parol evidence of this misrepresentation, and the appointment was set aside. Now the evidence offered by the defendant tended to the proof of a misrepresentation, in consequence of which Simpson was induced to accept the trust. It appears to me, therefore, that it ought to have been received.

Upon the whole, I am of opinion that the decision of the court of common pleas was right on the first exception, but wrong on the second. The judgment must, therefore, be reversed and a *venire facias de novo* awarded.

BRACKENRIDGE, J., concurred.

YEATES, J., being ill at the time of the argument, gave no opinion.

Judgment reversed.

## SNYDER v. SNYDER.

[6 BERRY, 488.]

**PAROL EVIDENCE TO VARY DEED.**—Parol evidence is not admissible to show that half an acre of land, included in an administrator's deed, was excepted at the time of sale.

**PROOF OF EXECUTION.**—An execution cannot be proved by parol; it must be shown by the records.

**LEADING QUESTIONS.**—A question so framed as to indicate the answer desired is a leading one. Hence, a witness cannot be asked, "Did he assign to you as a reason why he would not bid more for the Isle of Cue, that he could buy W.'s land for," etc.

**WRIT of error. Ejectment.** The lessors of the plaintiff claimed as the heirs at law of John Snyder, deceased. The defendant was merely tenant in possession, and claimed no title personally, the real dispute being between the heirs of John Snyder, deceased, and the heirs of Anthony Selin, deceased, who had purchased at a sale of the premises by J. Snyder's administrators. Letters of administration had been issued in the Snyder estate to the defendant, to Mary Snyder, the widow, and to John Miller, her brother-in-law. The widow subsequently married Jacob Kendig, who was offered as a witness in the cause and was objected to, on the ground that, should the administrators' sale be set aside, his wife would be entitled to dower. The case came before this court upon several exceptions to the ruling of the court below in admitting certain evidence, and to the charge to the jury. These exceptions are stated in the opinion.

*Fisher and Watts, for the plaintiffs in error.*

*Duncan, contra.*

**TILGHMAN, C. J.** The record in this case contains five exceptions to the opinion of the court of common pleas of Northumberland county. The first four are upon points of evidence, the last to the charge of the court. 1. The first exception was to the rejection of Jacob Kendig, a witness produced by the plaintiff. Before he was offered he released all interest which he might have in the right of his wife, or otherwise. The objection to Kendig is, that if the sale is set aside, his wife will have a right of dower. To this it is answered, that the wife has no immediate interest in the suit, nor could she give the verdict in evidence in an action of dower to be brought by her against the plaintiffs. In support of this are cited two cases from Johnson's Reports: *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; and

*Jackson v. Van Dusen*, 5 Johns. 147 [4 Am. Dec. 330]. In *Jackson v. Bard*, the widow was clearly disinterested, because she had joined her husband in a deed which barred her dower; so that it was indifferent to her whether the heir of her husband recovered or not, and that was one of the reasons, and it appears to me the principal one, which governed the court. *Jackson v. Van Dusen*, seems to have been decided on the authority of *Jackson v. Bard*, and therefore, it may be that the point was not thoroughly considered. There is privity of estate between Mrs. Kendig and her children, who are heirs of her husband. She is interested, therefore, in the verdict. If the plaintiffs recover, the land will be resold. From the great rise in value, it is certain that it will sell for much more now than formerly, consequently the estate of John Snyder will be increased, and the orphans' court will allow to Mrs. Kendig in lieu of dower, an annuity equal to the interest of one third of the increase. In the proceedings which take place in the orphans' court, in consequence of that sale being set aside by this verdict, the court will not only receive the verdict as evidence, but make it the foundation of the proceedings. When the land reverts to the estate of John Snyder, the administrators may petition for a new order of sale, to enable them to do justice to all parties concerned, and when the new sale is made, Mrs. Kendig will receive her proportion of the gain in the manner which I have mentioned.

Jacob Kendig, therefore, stands in the situation of a person who has no interest himself, but whose wife has an interest to take effect after his death. During his own life he has released everything which his wife would be entitled to receive; but he cannot release that which may accrue after his death. There remains, therefore, an interest in the wife, which she may either convey or release by an immediate deed, provided her husband joins her. A husband thus circumstanced is an incompetent witness, not because of interest, but because of the policy of the law, which excludes husband and wife from testifying, where the rights of either are concerned. Much of the happiness of society depends on the intimacy of husband and wife. The law considers them as one, and will not suffer their union to be broken, or even put to hazard by testifying against each other. As to testifying for each other, it would be so manifestly improper that there needs no argument on the subject. I am of opinion, therefore, that the court was right in rejecting the evidence of J. Kendig.

2. The next exception was to the admission of certain papers offered in evidence by the defendants, viz., arbitration bonds between John Snyder, deceased, and Simon Snyder, the defendant, an award of arbitrators, and a draft of a piece of land referred to in the award. There needs but to state the case in order to show that this evidence was properly received. The plaintiffs asserted that the defendant was a secret partner in Anthony Selin's purchase. After the death of Selin, the defendant came into possession; hence might arise a presumption unfavorable to the defendant. It was incumbent on him, therefore, to account for this possession, which he did, in part by the papers alluded to in this exception. The arbitrators made an award by which the defendant became entitled to part of the land included in this ejectment. The court was right, therefore, in receiving the evidence.

3. The next exception was to the admission of the records of sundry judgments against a certain Peter Weiser. This, also, will appear to be clearly right when the circumstances are explained. The plaintiffs objected to the conduct of the defendant in not making payment of the debts of John Snyder for a considerable time after his land was sold. The objection was answered as follows: John Snyder had purchased the land in dispute of Peter Weiser. There were several judgments which bound Weiser's land, prior to Snyder's purchase. Snyder was indebted to the estate of Weiser in a considerable sum, part of the purchase-money, for which judgment was obtained against his administrators. The sheriff of Northumberland county was insolvent, and great caution was necessary lest the payment made by John Snyder's administrators should not be applied to the discharge of the judgments which bound the land. This was the excuse offered on the part of the defendant, and it was right that he should be allowed the opportunity of proving his allegations.

4. The fourth exception goes to the deposition of John Miller. At first it was said that the notice of the taking of this deposition was not legal, but as that objection was waived on the argument, I shall say nothing of it. Several particulars in the deposition itself were then excepted to. 1. The witness swore that in the sale by the administrators of John Snyder to A. Selin, there was an exception of half an acre of the property of Simon Snyder. It is said that the half acre is included in the deed from the administrators, of whom Mr. Miller was one, to Selin. If so, the evidence was improper, because it was

in contradiction of the deed. 2. The witness had formerly been sheriff of Lancaster county, and swore that he had the real estate of a certain Michael Bower under execution while sheriff, and also his body, by virtue of writs of execution issued from the courts of Lancaster county. This evidence was also improper ; it should have been proved by the records that such executions had been issued. 3. One of the questions proposed to the witness was objected to as a leading question. I think the objection was good. The question was so framed as to indicate particularly the answer which the plaintiff wished. Instead of asking the witness whether he had heard John Bower say anything, and what, on a certain subject, the words were put into his mouth, viz: "Did he assign to you, as a reason why he would not bid more for the Isle of Cue, that he could buy Willing's land for the £3 an acre, and that on yearly installments, etc.?" I am of opinion, therefore, that the plaintiffs in error have supported their exception to Miller's deposition.

5. The last exception is to the charge of the court. In all respects, but one, I think the charge was correct. The conduct of A. Selin at the sale was submitted to the jury, and they were told that if, in their opinion, it was such as to deter others from purchasing, the sale was void, and the verdict should be for the plaintiffs. They were likewise told that if the defendant was secretly concerned in the purchase, the sale was void, because the defendant being authorized, together with the other administrators, to sell the land by order of the orphan's court, could not lawfully be the purchaser; and although he was concerned but in part, it was sufficient to vitiate the whole. So far the charge was as favorable to the plaintiffs as they had any right to ask. But the plaintiffs insisted further, that the orphans' court had no power to order a sale, because no inventory had been returned, nor was it proved to the court that there was not personal estate of John Snyder sufficient to pay his debts.

It was matter of controversy on the evidence, whether an inventory had been returned or not, and whether there was not sufficient proof that the personal estate fell short of the debts. On both these facts the court expressed their opinion in favor of the defendant, leaving them, however, to the decision of the jury. This was doing no more than the court had a right to do; but they went on to say that at all events the sale, having been made by order of the orphans' court, and afterwards con-

firmed, could not be questioned in ejectment, but stood good until reversed on an appeal. The law is clearly not so. The orphans' court is not a court of general jurisdiction, and with respect to the sale of lands they have no other power than is conferred by act of assembly. It might be more convenient, and render the law more uniform, if those proceedings were reversible only on an appeal; but after the long practice which has prevailed, of inquiring into those proceedings in actions of ejectment, it is too late to attempt an alteration. It is unnecessary to dilate on this subject, as we delivered our opinions explicitly in the case of *Messenger v. Kintner*, 4 Binn. 97. I think it, however, proper to remark, that although the proceedings of the orphans' court may be reversed in an ejectment, yet, as much property depends on those proceedings, great allowance should be made for the informal manner in which they have been conducted, especially where the titles acquired under them have been accompanied with long possession.

On the whole, my opinion is that the judgment in this case should be reversed, and a *venire facias de novo* awarded.

YEATES, J., differed from the chief justice in regarding the testimony of J. Kendig as proper evidence, and in considering the decree of the orphans' court in a case within its jurisdiction reversible only on appeal and not collaterally in another suit. Upon the other points raised the justice concurred with Tilghman, C. J., and was of opinion that the judgment below ought to be reversed and a new trial awarded.

BRACKENRIDGE, J., concurred with the chief justice.

Judgment reversed.

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As to the incompetency as a witness of the husband in this case Justice Gibson delivering the opinion of the court in *McComb v. Dillo*, 5 S. & R. 308, says, "An interest which goes to competency must, without doubt, be present and certain; and where it is otherwise as in the case of an heir or devisee, living the ancestor, it goes only to credibility; but where it is vested, it is both present and certain, and the uncertainty of enjoyment which seems to have been made the criterion by Judge Yeates [in the principal case] is immaterial; for if it were not, every person in whom a remainder is vested would be a witness to support the title to the particular estate, which is clearly not law. In *Snyder's lessee v. Snyder*, the wife evidently had a vested interest, for she would, if she had survived her husband, have enjoyed not *an* estate vesting in her at the time of his death, but the remnant of one which never was out of her, and which the husband could not convey." The subject of incompetency of witnesses being now of no practical importance, this point in the case has been left out in the syllabus.

As to the inadmissibility of parol evidence to vary a written instrument, this case is cited in *Heager v. Umberger*, 10 S. & R. 342.

Upon the power of the courts to inquire into a decree of the orphans court collaterally, in an action of ejectment, although *Snyder v. Snyder* is followed in *Fogelsonger v. Somerville*, 6 S. & R. 271, yet in *Orphans' Court v. Groff*, 14 Id. 184, it is said, after reviewing the earlier cases: "A decree of an orphans' court, unreversed and unappealed from, cannot be questioned in a collateral suit, unless in cases of fraud, or where the defect plainly appears upon the face of the proceedings themselves." And in *Klingensmith v. Bea*, 2 Watts, 489, this latter opinion is adopted, the court saying, per Rogers, J.: "A decree of an orphans' court is placed on the same footing as a judgment of a court of common law."

CASES  
IN THE  
COURT OF APPEALS  
OF  
MARYLAND.

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**KENNEDY v. THE BALTIMORE INSURANCE Co.**

[3 HARRIS AND JOHNSON, 367.]

**APPORTIONMENT OF FREIGHT.**—Freight is susceptible of apportionment as between the owners and the insurers, so as to give to each of the parties the usufruct of the ship during the time of their respective ownership.

**ACTION FOR MONEY HAD AND RECEIVED.**—The action for money had and received is an equitable action, and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case; and where money was received by an agent of a corporation, an obligation was thereby incurred by the corporation.

**APPEAL** from the county court. Kennedy brought an action of *assumpsit* for money had and received to his use by the insurance company. It appeared in evidence that Kennedy, being the owner of the ship *The Arethusa*, caused her to be insured by the defendants on a voyage from St. Domingo to Baltimore. While on the voyage, the vessel was captured by a British ship of war, carried into Bermuda, and she with her cargo libeled as prize. The vessel was liberated, but the cargo was condemned. Subsequently the decree condemning the cargo was reversed by the high court of appeals of Great Britain, and freight ordered to be paid by the claimants of the cargo. One Mangin, a London merchant, was defendant's agent in the prosecution of the appeals, and received for them, from the claimants of the cargo, the amount decreed to be paid as freight. The plaintiff also proved that immediately upon learning of the capture, he abandoned to the defendants, and claimed as for a total loss, and was paid accordingly. This action was to recover the freight paid to defendants' agent. On motion, the court directed the jury that *indebitatus assumpsit* would not lie against a corporation under the evidence produced.

The plaintiff excepted, and the verdict and judgment being for the defendant, appealed.

*Harper*, for the appellant, contended: 1. That a corporation could be sued in an action of assumpsit: *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Case v. Baltimore Ins. Co.*, Id. 358; 2. That an abandonment of the vessel was not an abandonment of the freight: *Marsh.* 604; *United Ins. Co. v. Lenox*, 1 Johns. Cas. 377.

*W. Dorsey*, *contra*, on the first point, cited 1 Bl. Com. 502; 1 Bac. Ab. tit. Corporations; 6 Bac. Ab. (Kidd's Suppl.) 267; *Taylor v. Dulerich Hospital*, 1 P. Wms. 656, 657; *Breckbill v. Turnpike Co.*, 3 Dall. 496; 1 Chitty's Pleadings, 97. On the second point, counsel cited 2 *Marsh.* 601, 602, 604, 620 (note); *Thompson v. Roscroft*, 4 East, 34; *Leatham v. Terry*, 3 Bos. & P. 479; *McCarthy v. Abel*, 5 East, 388; *Park*, 227; *United Ins. Co. v. Lenox*, 1 Johns. Cas. 377.

By Court, CHASE, C. J. The question to be decided in this case by the court is, whether an action for money had and received can be maintained by the appellant against the appellees, for money had and received by their agent for freight received for goods shipped in the *Arethusa*, from the complainants? In determining this question, the court are necessarily drawn into a consideration of the right the appellant has to the freight, and the extent of that right on the facts stated. What effect has the abandonment of the ship for a total loss produced? According to the opinion of the court, the abandonment of the ship for a total loss on account of the capture did, by operation of law, transfer all the right and interest of the appellant in the ship to the appellees, on their acceptance of the abandonment, and all the benefits and advantages directly or incidentally accruing from the ship subsequent to the capture. The abandonment for a total loss has a retrospective relation to the cause of the abandonment, and in this case to the capture of the ship. At that time all the right and interest of the appellant, the insured, in the ship ceased, and the right and interest of the insurers commenced. The assured, by his abandonment, had made his election to take that which was substituted by mutual consent as an equivalent for the ship, and the insurers, by their acceptance, gave their assent to it. What were the respective rights of the assured and insurers, at this time, as to the freight of the ship? If the freight is susceptible of apportionment, and in our judgment it is, and may be apportioned in such

manner as will do justice to both parties, by giving to each the usufruct of the ship during the time of their respective ownership, the proportion of each in this case to be ascertained according to existing circumstances. The principle of apportionment in this case and those similarly circumstanced, is founded in equity. The contingency which produced the abandonment cannot be attributed to either party, and the result ought not to be more unfavorable to one than the other. But if this principle is rejected on the ground that there is no criterion by which the apportionment can be made, then the insurers would not be burdened with the loss against which they insured; but, by receiving the whole of the freight, might be compensated for it, or, at any rate, their loss would be very much diminished at the expense of the assured. The court are of opinion that the appellant is entitled to all the emoluments or earnings of the ship anterior to the capture, to be adjusted by a jury on such evidence as is legally admissible before them.

The position is not to be controverted, that generally a corporate body cannot act but by its seal; but this position cannot be extended so far as to prevent their liability from the nature of their institution, or for acts done, necessarily or incidentally arising from an authority delegated by such body to their agent legally appointed. If it was otherwise, and the agent did acts, or received money, within the scope of the delegated authority, and became insolvent, the party transacting business with them would be without remedy in law or equity. In this case it is stated, that Anthony Mangin acted as the agent of the appellees in attending to the prosecution of the appeals in England, and in receiving money awarded to him in virtue of orders or decrees of the high court of appeals; and it is also stated that Mangin received one thousand two hundred and thirty pounds sterling money for freight in this case. The action for money had and received is an equitable action, and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case. And the court are of opinion that an assumption in law was created by the appellees in receiving the money through the agency of Mangin; and that the appellant is entitled to all the earnings and emoluments of the ship which had accrued prior to the capture.

Judgment reversed and *procedendo* awarded.

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This case is cited with approval in *National Mechanics' Bank v. National Bank of Baltimore*, 36 Md. 26; and in *Blair v. Blair*, 39 Id. 572, as to the action for money had and received being an equitable action.

## WALSH v. GILMOR.

[3 HARRIS AND JOHNSON, 323.]

**RESCISSION OF CONTRACT.**—Where a party refuses to keep goods according to contract, after they have been delivered to him under the contract, and the other party takes them from his warehouse with his knowledge and consent, for the purpose of a sale at auction, the contract is not thereby rescinded.

**PLEADING CONTRACT.**—In actions founded on contracts, the contract must be set out either *in hæc verba*, or according to the legal effect; and contracts being in their nature entire, if the contract proved, and that declared upon be different in any part, the variance is fatal.

**SAME.**—Whatever is alleged as inducement and is not impertinent and foreign to the cause, must be proved as alleged, and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter.

**AWARD, WHEN BAD FOR UNCERTAINTY.**—Where an award directed that the defendant should give an indorser "as per agreement submitted to the arbitrators and acknowledged by the parties," although it may be susceptible of being made certain and good by reference to the agreement to which it relates, yet there being no sufficient averment in the declaration by which the defect is cured, both the declaration and the award are bad.

**APPEAL** from the county court. The plaintiffs below, B. Gilmore & Co., brought an action of assumpsit against Walsh, setting forth in their declaration two counts: The first count stated an agreement between the plaintiffs and the defendant by which the latter agreed to purchase of the former "whatever brandy they might have on board the ship *The Ann*, from Bourdeaux, supposing the quantity to be ninety pipes or thereabouts, at the rate of one dollar and fifty cents per gallon, whatever the proof might be, provided the said brandy arrived at Baltimore" within six weeks from the date of the agreement; and that defendant agreed to give his notes therefor with good indorsers. The count further stated that the brandy arrived within the specified time; that defendant refused to take the same, and that the matter was then referred to two arbitrators who made their award in favor of plaintiffs, that defendant should take ninety pipes, or ten thousand gallons of brandy, and "ought to give an indorser as by the agreement submitted to the" arbitrators; that defendant had refused so to do, etc. The second count set forth the special agreement, without alleging the award, in substantially the same language.

It appeared in evidence from the letters passing between the parties, that the defendant contracted to purchase at the price named in the declaration, what brandy there was on the ship

Ann, except certain cognac, the private property of the plaintiffs and which was not intended to be sold, estimating the amount of brandy at ninety pipes; that defendant understood that he was to have all the brandy; that there were to be no consignments to any other houses, and that the quality of the brandy was to be of a superior brand. Upon the arrival of the vessel, there was found to be one hundred and eleven pipes of brandy on board, the property of the plaintiffs, nine of which were imported for plaintiffs' own use, and thirty-eight other pipes belonging to different persons. One hundred and two pipes were immediately sent to defendant's warehouse, but he refused to pay for the same alleging an inferiority in the quality and an excess in the quantity agreed upon. The parties then submitted the matters in dispute to the arbitration of Jno. Holmes and Jno. Stricker, who awarded that "after hearing the allegations of the parties, considering the contract, and all other circumstances relating thereto, do award that Mr. Walsh do choose, and that he is bound to take ninety pipes, or ten thousand gallons, out of the brandy delivered him by Robert Gilmor & Co., and that he ought to give an indorser, as per agreement submitted to us, and acknowledged by the parties." It appeared that in one of defendant's letters relative to the submission, which letter was placed before the arbitrators, defendant wrote: "If the gentlemen who may be chosen would say that my objections are not well founded, and that therefore I must be bound to the purchase of the brandy, I shall agree, so far as relates to any act within my own power; but, I must observe, it may not be in my power to obtain the indorser you called for."

During the time of the correspondence, and for a few days subsequent to the award, the brandy was in defendant's warehouse. Immediately after the award, plaintiffs applied to defendant to know whether he would abide thereby, and told him that, unless he would take the brandy by the following Monday, they would sell the same at auction on his account, and hold him responsible for any deficiency. Defendant replied that he would not abide by the award; that he did not consider the brandy his, and that plaintiffs might take the same whenever they desired. Accordingly, on the said Monday, plaintiffs removed the brandy and sold it at auction for a less sum than that agreed to be paid by the defendant.

The cause was twice tried; on the first trial, the verdict and judgment were for the plaintiffs. This judgment was reversed on an appeal, upon a certain exception filed, and the cause came

again before the court on the new trial. The verdict being a second time for the plaintiffs, the defendant appealed to this court upon a bill of exceptions, which appear from the opinion.

*Key, W. Dorsey and Harper, for the appellant.*

*Martin, Pinckney and Purviance, contra.*

By Court, BUCHANAN, J. This case is brought upon four bills of exceptions. The question on the first is: Whether the contract between the parties was rescinded by the act of the plaintiffs in removing the brandy, which formed the subject of the agreement, from the warehouse of defendant, and exposing it to sale at public auction. In deciding this question we feel no difficulty. The brandy was taken from the defendant's warehouse, with his knowledge and acquiescence, not with a view to rescind the contract, but because he had refused to keep it, and the sale at auction was resorted to as a criterion, by which to ascertain the *quantum* of injury the plaintiffs had sustained by the defendant's violation of his engagement. By the refusal of the defendant to receive it, the brandy remained the property of the plaintiffs, who had a right to dispose of it as they pleased; the removal and sale, therefore, did not operate in law to rescind the contract. The defendant had notice of the course they meant to pursue, and with a full knowledge of their object and intention in taking it away, consented to the removal of it. If an action had been brought to recover the price of the brandy delivered, the removal and sale would have been a good defense; for the value could not be demanded when the party was deprived of the article itself. But this suit is not for the price of the brandy; it is founded on the refusal of the defendant to receive it according to the terms of his agreement, and the object is to recover damages for that violation of his contract from a liability to which the defendant was not absolved by the act of the plaintiff in taking away and selling the brandy. We therefore concur in opinion with the court below on the first bill of exceptions; but differ from that court in the opinion to which the second bill of exceptions is taken.

In actions founded on contracts, the contract must be set out, either in the words in which it is made, or according to the legal effect; and contracts being in their nature entire, if the contract proved, and that declared upon, be different in any part, the variance is fatal. The second count in the declaration is on a special agreement. The letter from the plaintiffs of the twenty-seventh of July, 1795, and the answer from the defend-

ant of the same date, taken together, form the contract between the parties; and it clearly appears from those letters to have been their intention to except from their agreement the cognac which was on board the ship *Ann*. In the contract set out in the declaration, there is no such exception, but the agreement is stated to have been for "whatever brandy the plaintiff might have on board the *Ann*." There is an evident variance, therefore, between the contract declared upon and that given in evidence at the trial, which we think fatal, and are of opinion that the plaintiffs were not entitled to recover on the second count in the declaration.

The question on the third bill of exceptions is too plain to admit a doubt. Upon the slightest examination of the correspondence between the parties, relative to a reference of the subject of dispute, it will appear that the whole matter in controversy was submitted to the arbitrators, and that the award is within the submission. The third bill of exceptions, therefore, fails.

The fourth bill of exceptions presents the same question that is involved in the second, and the same variance appears between the allegation and the proof. But it is said that the agreement set out in the first count in the declaration, being only stated as inducement, the same exact certainty is not required as if the action had been founded on the contract itself. But whatever is alleged as inducement, and is not pertinent and foreign to the cause, must be proved as alleged; and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter. In this case, therefore, even if it was unnecessary to have set out the agreement between the parties, yet being set out, and not being impertinent, and connected with the cause, it ought to have been proved as stated, and not being so proved, the plaintiffs were not entitled to recover on the first count in the declaration. We therefore dissent from the opinion of the court below on the fourth bill of exceptions.

The objection to the uncertainty of the award in that part in which the defendant is directed to give an indorser, "as per agreement submitted to the arbitrators and acknowledged by the parties," is well taken, and though it may be susceptible of being made certain and good by reference to the agreement to which it relates, yet there is no such averment in the declaration by which the defect is cured, and therefore both the declaration and the award are bad in that particular. The

answer that the defect is cured after verdict, does not remove the objection. The omission of an averment is sometimes aided after verdict, on the ground that everything may be presumed to have been proved which was necessary to sustain the action; and if it should be admitted that the want of an averment in this case would have been aided after verdict, if the cause had been brought up by writ of error on the pleadings alone, yet the bills of exception taken at the trial, which contain all the evidence offered to the jury, and upon which the court was required to direct them, that the plaintiffs were not entitled to recover, strips the verdict of all its healing power and presents the question wholly uninfluenced by it; for nothing can be presumed to have been proved which does not appear in the bills of exceptions; and the plaintiffs, not being entitled to recover on the evidence so stated, the legal intendment fails by which alone a verdict can be called in aid of a title defectively set out.

Other points were stated by counsel in argument, which it has not been thought necessary to examine. The court is of opinion that the judgment of the court below ought to be reversed.

JOHNSON, J., dissented.

Judgment reversed and *procedendo* awarded.

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See on the point of pleading *Lent v. Padelford ante*, 113. The principal case is cited and relied on in *Hoke v. Wood*, 26 Md. 460, as to pleading and variance; and to the same point in *Rich v. Boyce*, 39 Id. 325.

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## DORSEY v. DORSEY.

[3 HARRIS AND JOHNSON, 410.]

**EVIDENCE OF HANDWRITING.**—The testimony of a witness as to the contents of a letter is inadmissible, when it appears that the witness had never seen the alleged author of the letter write, and had no knowledge of his handwriting.

**DECLARATIONS RESPECTING TITLE.**—Though, as a general rule, a party's own declarations cannot be admitted to defeat a prior deed, yet the declarations of a man respecting his title, made before he parts with his estate, are evidence against him and all claiming under him.

**PURCHASE BY TRUSTEE.**—A trustee can never be a purchaser upon a sale of the trust estate

**APPEAL from a decree of the court of chancery.** The appellant, Edward Hill Dorsey, the complainant in the lower court,

filed his bill to set aside a sale of his lands, made while he was an infant, by the defendant's testator, as his guardian and trustee, pursuant to an order of the court of chancery. It appeared that the sale was directed in answer to a petition filed by certain of the creditors of Caleb Dorsey, deceased, a portion of whose real estate the complainant held as heir at law of Samuel Dorsey, a son and one of the devisees of Caleb. The defendants' testator, Edward Dorsey, was also a son and devisee of Caleb, and was the uncle as well as the guardian of the complainant. The ground on which the sale was sought to be vacated was, that the land was sold to a third person, one S. Godman, for the use of the trustee; that at the time of the sale, S. Godman was insolvent; that the trustee, the defendant's testator, always used and possessed the land as his own, and immediately after the sale cut down wood, etc., and that S. Godman never exercised any acts of ownership over it. It appeared that about ten months after the sale to Godman, he reconveyed the premises to defendant's testator for a consideration expressed to be slightly in excess of the price purported to be paid on the sale to Godman. Evidence was also given of the declarations of S. Godman, since deceased, that he purchased the land for the use of the complainant's guardian. The testimony of Brutus Godman, son of S. Godman, was offered to prove that he had seen a letter signed Edward Dorsey, requesting S. Godman to purchase the land of the complainant for him, E. Dorsey. Brutus did not know the handwriting of E. Dorsey.

KILLY, Chancellor, dismissed the bill, whence the appeal was taken.

*Pinkney and Key*, for the appellant, on the point as to the admissibility in evidence of the declarations of S. Godman, cited *Strode v. Winchester*, 1 Dick. 397; *Willis v. Willis*, 2 Atk. 71; *Man v. Ward*, Id. 229; and as to the inability of a trustee to purchase at his own sale, counsel relied upon *Whelpdale v. Cookson*, 1 Ves. 9; *Munro v. Allaire*, 2 Cai. Cas. 192 [2 Am. Dec. 330]; *Oldin v. Samborne*, 2 Atk. 15; Sugd. 391; *Conoway v. Green*, 1 Harr. & J. 151.

*Martin, Shaaf and Harper, contra*, contended that the declarations of S. Godman, made when he had an interest in the land, were not to be received as evidence against his alienee or vendee: *Ford v. Lord Grey*, 1 Salk. 286; 6 Mod. 44; and that as Godman could not have been a witness at the time he made the declara-

tions, they could never after be evidence. The testimony of Brutus Godman was clearly inadmissible, he had never seen E. Dorsey write, nor did he know his handwriting. Counsel, also, urged that the evidence did not show that S. Godman purchased at the instance, and for the benefit of E. Dorsey.

By Court, BUCHANAN, J. [after reviewing the facts]: The testimony of Brutus Godman was properly rejected; he had never seen Edward Dorsey write, and had no knowledge of his handwriting. Proof, therefore, of the contents of the paper spoken of, was clearly inadmissible. But this court think the chancellor erred in not receiving the declarations of Samuel Godman, that he had purchased the land in question for Edward Dorsey. The declarations of a man respecting his title, made before he parts with his estate, are evidence against him, and all claiming under him; and the distinction attempted to be taken between the case of a voluntary transfer and that of a conveyance for a valuable consideration, is not supported.

In this case Godman was the purchaser at the sale received a conveyance from Dorsey, the trustee, and afterwards reconveyed to him; and it is clear from the proof in the cause, that his declarations were made between the time of the sale and the date of his deed to Dorsey; they would have been against him as admissions respecting his title, and are competent evidence against those claiming under him, who stand in his place, and hold the land subject to any imperfection of title which attended it in his hands. But the declarations of Godman are not the only evidence that he made the purchase for Dorsey. The situation of Godman at the time, the proof that he never took possession of the land, entered upon, or exercised any act of ownership over it; and the circumstance that Taylor's Forest, which was devised to Samuel and Edward Dorsey as tenants in common, had been divided before the sale; that Edward Dorsey, who as guardian of Edward Hill Dorsey, was in possession at the time of sale of the part sold to Godman, never parted with the possession, but immediately after the sale, commenced cutting down the wood that stood upon it for the use of his furnace, and continued to cut it until his death, or until all was cut down, are very strong and difficult to be resisted.

This court are, therefore, of opinion, upon the evidence before them, that Samuel Godman did buy the land in question for Edward Dorsey, the trustee; and that on the established principle, that a trustee can never be a purchaser at his own sale, the

deeds made in consequence thereof ought to be vacated, there being no evidence to satisfy the court that Edward Hill Dorsey, the only person interested, ever assented to the purchase. and that the decree of the chancellor ought to be reversed

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In *McDowell v. Goldsmith*, 6 Md. 338, the court relies upon the doctrine of this case, saying: "It is a general and very salutary rule of evidence, that a party will not be permitted by his own declarations to defeat a prior deed; but it is also well settled, that, in some cases, the declarations and admissions of a grantor will be received where the effect may be to impair the title of persons claiming under him." The same principle is reaffirmed in *Keener v. Kaufman*, 16 Md. 308.

CASES  
IN THE  
SUPREME COURT OF APPEALS  
OF  
VIRGINIA.

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ROOTES v. WELLFORD.

[4 MURFORD, 215.]

**POWER OF PARTNER AFTER DISSOLUTION.**—After the dissolution of a copartnership, one of the partners cannot bind the others without their consent by settling accounts with or allowing credits to, customers of the firm.

**ASSUMPSIT** by Wellford & Co. against Rootes. The declaration contained several counts for goods sold and delivered by the plaintiffs to the defendant for the use of the plaintiff, and for a balance upon an account. *Non-assumpsit* pleaded. The material question in the cause was as to the power of a partner after dissolution to bind the copartnership. It appeared that Wellford & Co. formed a copartnership about September, 1803, and that previously, a partnership under the name of Winchester, Howard & Co., Richard and Stephen Winchester being partners therein, had carried on business in the same building with the plaintiff, and continued to do so till December, 1804, when the firm was dissolved and another formed by Richard and Stephen Winchester in the same manner and place. The capital of the plaintiffs was furnished by Winchester, Howard & Co., and Richard and Stephen Winchester; and after a formation of the firm by the latter, the whole stock of the former firm, amounting to about fifty-one thousand dollars, was transferred to the new firm, they undertaking the debts of Winchester, Howard & Co., and the collection of debts due them. Rootes was charged by the new firm with a certain balance due by him to the old firm as appeared from the books, but did not credit him for certain fees for professional services due him by the former firm.

The defendant gave in evidence an account stated between

himself and R. and S. Winchester, in which credits were given him, and a balance stated in his favor. The account had been stated and settled by the defendant and Stephen Winchester, after the dissolution of both the partnerships; no settlement thereof having been before made, and the credits as allowed did not appear on the books of the late firm.

A verdict was found, and a judgment rendered for the plaintiffs, from which an appeal was taken.

*Stanard*, for appellant.

*Green*, for appellee.

By Court, ROANE, J. The court is of opinion, that no debits could be set up on account of either of the said firms, in the present action, unless the same were duly admitted by those having competent authority; and the fees claimed in the present case, having only been admitted to have been due from Stephen Winchester, from Winchester, Howard & Co., and from Richard and Stephen Winchester, to the appellant, by Stephen Winchester after both the last mentioned firms were dissolved, and when he consequently had no authority to bind the said firms by such settlement.

On the ground, therefore, of the want of authority in Stephen Winchester, to charge the firm of Winchester, Howard & Co., at the time of the settlement of the fees in question, and that they could never be rendered liable to the appellees for the money so claimed to be discounted, under that settlement, the court is of opinion that it formed no proper subject of discount against the appellees, and that the judgment should be affirmed.

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See *Chardon v. Oliphant*, *post*.

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## BUFORD v. BUFORD.

[4 MURFORD, 241.]

**JUDGMENT OF ANOTHER STATE—CONCLUSIVENESS.**—A record, duly authenticated, of the proceedings of a court of competent authority, in one of the states, is conclusive evidence in the courts of another to show that a judgment was rendered, and the obligation of the party to pay the amount recovered; but it may be opposed by proof of fraud or collusion, or of subsequent payments or discounts.

**ASSUMPT** to obtain from the defendant, as plaintiff's co-surety, one half the amount recovered against the plaintiff in Kentucky

by Isham Talbott, in two actions prosecuted by him on two bonds against the principal and the plaintiff. In support of his claim plaintiff offered in evidence the duly authenticated records of the judgments obtained in Kentucky. To this evidence defendant objected; but the court overruled the objection, saying: "The aforesaid records were conclusive evidence between the parties in this suit, as to the amount recovered, and the sum that the plaintiff in this case was bound to pay Isham Talbott, the plaintiff in the suits referred to in the said records; and that the defendant should not be at liberty to prove any circumstances to impeach said judgments, except that they were obtained by fraud; and this he must prove expressly." The defendant then offered evidence to prove that all the matters in dispute between Talbott and the defendants in the actions in Kentucky, including the subject-matter of those actions, had been referred to arbitrators; but it appearing that the plaintiff in the present action had taken exceptions to the award, the record of which was not produced, the evidence was rejected.

Verdict and judgment for the plaintiff; whereupon defendant appealed.

*Wickham*, for the appellant.

*Wirt*, *contra*.

By Court, ROANE, J. The court is of opinion that there is no error in the opinion of the supreme court, admitting the judgments in the bill of exceptions to be exhibited as conclusive evidence to show the amount recovered against the appellee by Isham Talbott, and the amount he was thereby compelled to pay, and not understanding that court as prohibiting evidence on part of the defendant tending to reduce the sum claimed against him in consequence of such judgment, or to show that the same was fraudulently or collusively obtained, and being also of opinion that, as the award, mentioned in the latter part of the bill of exceptions, is stated to have been set aside by the appellee and James Buford, on exceptions taken thereto, and the record thereof not having been exhibited, which is supposed to have been the only competent evidence; the court thus understanding the opinion and judgment of the superior court aforesaid, affirms the same.

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So far as this decision holds that fraud may be shown in obtaining the judgment in the other state, it is not in harmony with the doctrine now held, as shown in a note to *Bartlet v. Knight*, 2 Am. Dec. 36; for if the court had ob-

tained jurisdiction, the fraud should have been pleaded in the former suit. Probably the court referred to the case where jurisdiction was fraudulently or collusively obtained; when, in fact, it might be held there was no proper jurisdiction. The case is relied on in *Draper v. Gorman*, 8 Leigh, 654, and *Beeson v. Stevenson*, 7 Id. 113.

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## PARKER v. CARTER.

[4 MUMFORD, 273.]

**SECRETS COUNSEL BOUND TO KEEP.**—It is a settled rule of law that counsel and attorneys ought not to be permitted to give evidence of facts imparted to them by their clients, when acting in their professional character. And this restriction is not confined to facts disclosed in relation to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise.

**WHEN PROFESSIONALLY ACTING.**—A duly qualified counsel or attorney, employed as such to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him, and the same rule applies to interpreters acting as the organ of communication between the client and his attorney.

**APPEAL** from a decree of the superior court of chancery dismissing plaintiff's bill. The case is stated in the opinion.

*Williams and Wickham*, for the appellant.

*Wirt*, contra.

By Court, ROANE, J.\* This is a bill brought by the appellant against the appellees, J. C. Carter and Apphia, his wife, and their children, as also, among others, against the representatives of Edward Carter, the trustee named in a deed of settlement, of April 5, 1784, from Wm. Fauntleroy, the father of the said Apphia. That deed conveyed certain negroes to the said trustee, for the use of the said Apphia for life, free from the control of her husband and his creditors, and after her death, to the use of all her children who should then be living. The bill was brought after the appellant had obtained a judgment at law against the said J. C. Carter, upon a bond of April 12, 1784, given by him to Hudson Muse, and assigned to the appellant, and after the said Carter had taken the oath of an insolvent debtor, under an execution sued out upon the said judgment. Its object is to set aside the deed aforesaid, in

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\* A majority of the judges of the court of appeals being interested in this cause, it was heard and determined by a special court of appeals, consisting of Roane, White, Taylor, Prockenbrough, Randolph, and Nelson.

favor of the said appellant, and subject the negroes thereby conveyed to the payment of the debt aforesaid, on the ground that he was a creditor of the said J. C. Carter, and that on his marriage with the said Apphia, in 1782, the said slaves had been delivered to him, under a parol gift thereof, by the said William Fauntleroy. The bill also prays a decree against three of the sons of the said Carter and wife, on the ground of an alleged agreement on their parts to pay the debt in question. The decisions of the court of appeals, upon the true construction of the act of 1758, for preventing fraudulent gifts of slaves, having declared void all such gifts, made prior to the act of 1787, as were not evidenced by a deed, although possession of the slaves given may have been delivered to the donee; the present claim can only be set up on the ground of the appellant having been a creditor of the donee, J. C. Carter, and that the possession of the slaves aforesaid, under the gift, either singly taken, or in connection of acts of ownership on his part, and of consent or connivance on the part of the donor, ought, in a controversy between the latter, or volunteers claiming under him, and the creditors of the former, to give him the preference. Where such possession has actually taken place under the parol gift, it is a matter of great importance to decide of what character that possession must be, in relation to its tendency to deceive the donee's creditors, and what acts of ownership, or of consent and connivance as aforesaid (if a possession singly is not sufficient), and whether all the said circumstances, conjunctly taken, are adequate to produce the effect above mentioned. But if no possession is shown to have taken place under such gift, these important inquiries are unnecessary to be gone into. There would then be no foundation on which the claim of the creditor can be erected.

In such case it is also unimportant, for the same reason, to inquire whether the party was a creditor of the donee or not, prior to the delivery of the deed attempted to be impeached, or whether that circumstance be important. None of these inquiries will now be gone into by this court. It is unnecessary, because there is no adequate proof in the cause that the appellee, J. C. Carter, ever had possession of the negroes in question under the parol gift before mentioned. However the case, on this point, might have stood if the deposition of Richard Parker should be sustained, it is clear that, if that deposition be withdrawn from the cause, the answers of the appellees, J. C. Carter and his wife (which on this point of possession are

strictly responsive to the bill), must preponderate. There is, afterwards, nothing but circumstances to be opposed to those answers. As for the witness, Mr. Parker, he admits that he was a practicing attorney at the time; that it was in that character he drew the deed in question, and expected to receive a fee for drawing it. This is not only admitted by him, but it results from the nature of the application that it was in this character he was applied to and retained. He was applied to by Mr. Fauntleroy to draw such a deed as would settle the negroes on the appellee, Apphia, and exempt them from liability to her husband's creditors. The preparing such deed necessarily required some degree of legal knowledge, and it might not be that a person wholly unskilled in law would be competent to draw it. While we say this, it is by no means intended to be admitted that where an attorney is retained and consulted, his right to disclose his client's secrets depends at all upon the difficulty or clearness of the case submitted.

A compliance with Mr. Fauntleroy's request, in this instance, necessarily required the facts to be by him stated, on which the attorney's judgment was to turn, and the fact then disclosed, touching the delivery under the parol gift, was all important in forming a right conclusion on the subject. Being thus important, it is wholly immaterial whether it was disclosed by way of answer to an inquiry of the attorney, or was spontaneously mentioned by his client. But if the fact were even unimportant, it makes no difference as to the principle now in question. It is enough that it was communicated by the client, in a professional consultation with his counsel. As to the exception set up from the general rule in this case, on the ground of the publicity of the conversation in which the disclosure was made, while it does not follow that, because there might have been many persons in the court-house at that time, they were so engaged as to have attended to this conversation, this publicity only shows indiscretion on the part of Mr. Fauntleroy. We must not, in relation to a fact of a highly confidential nature, and strictly applying to the question submitted, embark in a field of uncertainty and conjecture, and without any certain scale to go by, undertake to decide from the place and manner of the conversation, that this fact was not disclosed in confidence. It is safer and more conducive to that free intercourse which should exist between a client and his attorney to consider all communications confidential which fall within the description just mentioned; unless, indeed, the client should seem to vaunt his disclosures to the

public, and, as it were, challenge the bystanders to hear them. Whatever opinion the witness, Mr. Parker, may therefore have entertained as to his not being bound to secrecy, either because there was no cause depending in court at the time, and in which he was employed, because his counsel or advice was not literally asked for in the case; or on account of the place and manner in which the conversation was held; this court differs in opinion from him upon all these points, and in respect to the disclosed fact now in question, holds him to have been an incompetent witness.

This court understands it to be the settled law, that counsel and attorneys ought not to be permitted to give evidence of facts imparted to them by their clients, when acting in their professional character; that they are considered as identified with their clients, and of necessity intrusted with their secrets, which, therefore, without a dangerous breach of confidence, cannot be revealed; that this obligation of secrecy continues always, and is the privilege of the client, and not of the attorney. The court is also of opinion that this restriction is not confined to facts disclosed in relation to suits actually depending at the time, but extends to all cases in which a client applies, as aforesaid, to his counsel or attorney for aid in the hire of his profession. If the principle was confined to causes actually depending at the time, there would be no safety for a person consulting counsel as to the expediency of bringing suit or of compromising one which is contemplated to be brought against him. When such suit should be afterwards instituted, all his disclosures previously made, with a view to obtain counsel and avoid litigation, would be given in evidence against him. The same necessity exists in both cases; and there is in principle no difference between them.

With respect to the persons who are subject to this restraint, the court is of opinion that it is confined to the two descriptions of persons before mentioned. As to causes depending in court, a client can only have an interest in their services, for they alone will be permitted to represent him; and, as to counsel and advice obtained in other cases, these are the only safe depositories of a client's interests, under the care our law has taken to confide the functions in question only to men of probity and legal knowledge. The policy of the law in the respect last mentioned would be violated were any citizen to be permitted to invest *ad libitum*, and without necessity, any other citizen, however corrupt or unqualified, with the functions aforesaid. That investi-

ture would also carry with it the high privilege now in question, which, too, arises only from the necessity men are under to act, in their legal concerns, through skillful and qualified agents.

As to the objection of the appellant's counsel, that the deed of settlement in question was not delivered, without deciding whether, under the actual circumstances of this case, that delivery would be presumed to have been made or not, the court is of opinion that this fact is neither charged in the bill nor put in issue by the pleadings. It is not even charged under a general allegation that the said deed was void; but the bill, not denying that the deed was good in itself, takes the ground that its effect on the property therein embraced was lost, as to the claim of the appellant, by means of the anterior and collateral circumstances which are relied on in his favor. The court also concurs in opinion with the appellee's counsel, that this defect in the charging part of the bill is not supplied by a subsequent interrogatory, which calls for information on the subject of its delivery. With respect to the alleged agreement on the part of three of J. C. Carter's sons, it is probable that their answers, denying the obligation thereof, ought not to be taken as a denial of the agreement itself—both because such denial is rather their inference than a positive negation of a fact, and because, in their answers, they refer to the very letter which is alleged to contain that agreement. The question then recurs, Was the promise therein contained consummated by the agreement of both parties? and was that promise founded upon an adequate consideration? While the court is at least doubtful whether the former was the fact, in this case it does not see that there was any agreement or consideration moving from the appellant to the sons, which would prevent their promise from being considered nude. However, the letters in the record may have bound the appellant, in the event of an arrangement by J. C. Carter, and in relation to him, we see nothing binding him to forbearance, or the like, in the event of an assumption by the sons. On this ground, the case is also with the appellees; and the court is of opinion, that independently of the objection arising from the want of consideration as aforesaid, the appellant comes with bad grace into a court of equity, asking a decree against third persons, who were induced to make the promise relied on, only by his representations, which now appear to us to have been unfounded and delusive. On these grounds, the court is of opinion to affirm the decree before us. I am also instructed to say that the judges are unanimous, in

the opinion now delivered; with the exception that one of them does not, on the testimony, consider the disclosure made to Mr. Parker to have been confidential. That judge, however, authorizes me to say that if Mr. Parkers' deposition had been sustained by the court, he would nevertheless have been of opinion to affirm the decree.

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v. *Denniston*, 2 Am. Dec. 145.

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## BULL v. DOUGLAS.

[4 MUMFORD, 303.]

**MEASURE OF DAMAGES—FAILURE TO DELIVER.**—Where there is a failure to deliver certificates of stock pursuant to contract, the measure of damages is not the nominal amount of the stock with interest from the day when it should have been delivered, but its true value on that day, including the interest then due, with legal interest on such value until payment.

BULL filed by Douglas, administrator of Turnbull, to obtain a decree foreclosing a mortgage. The mortgage was given to secure the performance of a contract, by which Bull agreed to sell and deliver to Turnbull on the first of January, 1802, six thousand dollars of the United States eight per cent. stock at the price of six thousand current dollars together with the interest due thereon from January 1, 1801, defendant having by a former contract engaged to deliver the stock on that day. The chancellor on the thirtieth of March, 1805, decreed that unless the defendant should, by the first of August ensuing, transfer to the plaintiff six thousand dollars of United States eight per cent. stock, or that sum in current dollars, which the plaintiff agreed to accept in lieu thereof, together with eight per cent. thereon from the first of January, 1801, to the twenty-ninth day of May, 1805, also six per cent. on six thousand dollars from the date of the decree till payment, then the equity of redemption should be foreclosed and the land sold. The stock and money were not paid, and the land was sold for six thousand dollars. Upon the commissioner's return in July, 1807, the chancellor made his final decree, crediting the defendant with the proceeds of the sale after deducting commissions, etc., and directing him to pay the balance to the plaintiff with continuing interest; from which decree the defendant appealed.

*Chapman Johnson*, for the appellant.

No counsel appeared for the respondent.

By COURT. The court is of opinion that the contract in this case having been for the delivery of six thousand dollars of eight per cent. stock of the United States, on the first day of January, 1802, with the interest due thereon from the first day of January preceding; and that stock not having been delivered according to contract, and being of uncertain value, its true value on the day agreed on for the delivery to be ascertained by one of the commissioners of the court, or by an issue (in default of argument by the parties as to its value), together with the interest due on the same, up to the time, as aforesaid, form the aggregate sum due by the appellant to the appellee, agreeably to the decision of this court in the case of *Groves v. Graves*, and not the nominal amount of the said stock, as seems to have been supposed by the chancellor. The court is also of opinion that in default of the payment of the said sum, and interest at the rate of six per cent. upon the value so found as aforesaid, by a given day, the land in the indenture of mortgage contained ought to have been decreed to be sold, to satisfy the same, in the usual manner; the interlocutory decree of the thirtieth day of March, 1805, therefore having proceeded upon erroneous principles, and having been, possibly, for a greater sum than was due by the appellant, is, as well as the last decree, erroneous. Decree reversed, and cause remanded to be proceeded in upon the above principles.

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As to the measure of damages, this case is followed in *Christian v. Miller*, 3 Leigh, 90.

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## NELSON v. CARRINGTON.

[4 MUMFORD, 332.]

**DEFICIENCY IN LAND SOLD.**—In case of a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments, and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not.

**MEASURE OF COMPENSATION.**—The measure of the compensation to be made for a deficiency in case of a sale of land by the acre, unattended with any particular circumstances, is the average value of the whole tract, without regard to the fact that the deficiency was in a certain quality of land.

**AGREEMENTS TO SELL BY EXECUTORS, HOW REGARDED.**—The rule of equity is to discountenance bargains of hazard. Hence, if an agreement of sale by an executor be equivocal, the court should be inclined to consider it a sale by the acre, and not by the tract, it being a dangerous principle that executors or other fiduciaries should take upon themselves, by means of bargains of hazard, to jeopardize the interests confided to their care.

**RENUNCIATION BY EXECUTORS.**—A testator, in the year 1784, having directed that his executors should sell all his real and personal estate for the payment of his debts, and having appointed four executors, three of whom qualified, a sale in 1794, by two of the acting executors, was held valid, and the third executor (as well as the fourth, who never qualified) was presumed to have renounced his right to administer, as at the date of the sale.

**VENDOR RATIFYING SALE.**—A vendor, by bringing suit and obtaining judgment for the purchase-money, ratifies and confirms the sale, so that it cannot be set aside at his instance.

**APPEAL** from a decree of the chancellor. Lewis Burwell, the elder, died in 1784, and by his will authorized his executors to sell at public or private sale, as they should deem best, all his estate, real and personal, and directed that the proceeds be applied to the payment of debts and the satisfaction of certain legacies. The testator's sons, Lewis and Nathaniel, and John Page and Louis Burwell, of Mecklenburg, were appointed executors, but only the last three qualified. In July, 1794, Nathaniel Burwell, as executor, entered into an agreement with John Nelson for the sale of certain realty belonging to the deceased's estate "on the waters of Roanoke, containing about five thousand one hundred and thirty acres, more or less, at the price of thirty shillings per acre, the quantity to be ascertained by actual survey, if the said Nelson shall require it." Certain times were specified on which the purchase-money was to be paid. It was also provided that as Nelson had not yet seen the land, he was to have twelve days in which to determine whether or not he would take the same. Nelson saw the land, and completed the bargain. In pursuance of a provision in the articles of agreement, Nelson gave his bonds for a part of the unpaid purchase-money, secured by a mortgage on sundry slaves. Portion of the purchase-money was applied to the discharge of a pre-existing mortgage on the land in favor of a London firm, and on the 25th of December, 1794, Nelson was put into possession by Lewis Burwell, of Mecklenburg. After several payments according to the terms of sale, Nelson wrote to Nathaniel Burwell in March, 1801, protesting against making further payments, on the ground that the sale by one executor only would not transfer a perfect title to the land, and asked that the other executors sign, in order to make the title secure. Nathaniel Burwell died in 1802, he being at that time the surviving executor, and Lewis Burwell, of Richmond, qualified as the executor of Nathaniel. Soon after, Lewis died, and the appellee, Carrington, qualified as his executor.

In 1802, Nelson had the land surveyed by one Fox, and for the first time discovered that the tract contained but four thousand one hundred and twenty-five acres, and not five thousand one hundred and forty-one acres, as was supposed, and as appeared from the original survey by Fontaine.

Carrington having brought suit on Nelson's bonds and recovered judgment, Nelson obtained an injunction from the superior court of chancery, and claimed a decree for the money which he contended had been overpaid on account of his purchase. Carrington, in his answer, acknowledged the deficiency, but contended that it was in the high and wooded lands, which were of very inferior quality, and that the low grounds, which were of much greater value, contained more acres than was supposed by Nathaniel Burwell at the time of the sale. The chancellor dissolved the injunction, and directed Nelson to pay the balance due on the contract. From this decree the appeal was taken.

*George K. Taylor and Call*, for the appellant.

*Wirt and Wickham*, *contra*.

By COURT. The court is of opinion, that by the agreement of the twelfth of July, 1794, between the appellant and Nathaniel Burwell, one of the executors of Lewis Burwell the elder, if the same had contained no clause giving the appellant an election to survey, he would have been entitled to relief in the case of the deficiency, which has appeared in the land thereby contracted to be sold; the known law of this court being, that, in cases of a sale by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments, or the like; that this principle is not departed from, but in cases of a sale by the tract, the purchaser clearly agreeing to take the hazard of all deficiencies upon himself; and that in the case of a sale by an executor, under the will of his testator, if the agreement be in this respect equivocal, the court would be inclined to consider it a sale of the former class, and not of the latter, so as to correspond with his clear and acknowledged power to sell by the acre, rather than countenance the dangerous principle that executors or other fiduciary characters should take upon themselves, by means of bargains of hazard, to jeopardize the interests confided to their care. The court is further of opinion, that this character of the agreement before us is ratified and strengthened, in relation to the appellant, by that provision thereof which expressly reserves to him the right to survey.

The court is further of opinion that there being no time mentioned in the contract, for the assertion of the election to survey in this case, at the same time that that instrument has bound down the appellant to particular days, happening within a short time in relation to concluding the bargain, taking possession of the land, and giving bonds for the purchase-money thereof, the right of election aforesaid is not limited by the terms of the contract; on the principle that the expression of one thing operates to the exclusion of another; and that, consequently, no limit exists in the case before us, in relation thereto, except such as results from the general principles of equity, respecting the lapse of time; subject, however, to be affected by acts showing an intention to abandon the right aforesaid, on the one hand, and to ratify and confirm the agreement, considered independently of the said right to elect on the other. Whether, and how far, such acts have taken place, in the case before us, will be presently more particularly considered.

The court is further of opinion, that although the tract of land in the proceedings mentioned was liable, and was actually decreed to be sold by the superior court of chancery in satisfaction of the mortgage therein also mentioned, yet the sale by the executors in this case having been for a full and fair price, and having also the consent and confirmation of the mortgagees, and those claiming under them, there is no objection to its validity arising from the existence of the mortgage and decree aforesaid.

The court is further of opinion, that as the written contract for the sale in question was signed by Nathaniel Burwell, one of the acting executors of Lewis Burwell the elder; as the appellant was put in possession of the land by Lewis Burwell of Mecklenburg, the other acting executor, who also manifested his assent to the sale by other acts proved in the cause; as the said sale was recognized and ratified in writing by Lewis Burwell of Richmond, who, after the death of Nathaniel Burwell, the surviving executor of Lewis Burwell the elder, became his executor, as was also recognized and ratified by Edward Carrington, the executor of the last-mentioned Lewis Burwell, by bringing the suits, the judgments of which are now in question; the said sale was duly made by the executors who alone acted, and were consequently authorized to make it; and that upon the facts proved in this cause, John Page and Lewis Burwell, of Richmond, will be presumed to have renounced their right to administer the estate of Lewis Burwell the elder, as at the date

of the sale in question (if the said John Page was then in life), which renunciation need not be shown of record, under the decision of this court in the case of *Geddy v. Butler*, 3 Munf. 345. With respect to the loss of the right of election in this case, the court is of opinion that that was not determined on the first of August, 1794, for that day was only given to the appellant to determine whether he would accede to the bargain or not; nor on the twenty-fifth of December, 1794, for that day is only agreed on as the one on which the possession of the land was to be delivered, and the bonds and other assurances were to be entered into; nor does the court perceive that the day assigned for the last payment of the consideration necessarily determined the election, unless, at that time, the whole business had been concluded, and a right to the land made or tendered, on the part of the appellees, nothing being more clear, in the opinion of the court, than that, although the day of payment may have arrived, a purchaser is not bound to part with the purchase-money, nor to make a final adjustment of the balance due for land purchased, unless a title is made or tendered, agreeably to the terms of the contract.

In this case it is evident there were difficulties respecting the completion of the title, existing long after the said day of payment had arrived, and which even yet exist, amply sufficient to have justified the appellant in the belief that he would yet be in time to make that election, when his prospect of getting a title to the land should have become less remote.

As to any acts of abandonment of this right of election, on his part, none such are proved; on the contrary, he is shown to have been in quest of a surveyor, to enable him to exercise it, in the year 1799, and perhaps before, which was not long after the last day of payment had arrived. And, as to any acts confirming the agreement as a contract of sale in gross, the court is of opinion that none such are shown to have taken place; no final conclusion of the business had been made; no deed or release of the mortgage had been tendered by the executors or accepted by the appellant; that important circumstance, therefore, is wanting in this case, which was so emphatically relied on by this court as an act of confirmation, if not the only act of confirmation in the case of *Jolliffe v. Hite*, 1 Call. 301 [1 Am. Dec. 519]. As to the mere lapse of time which took place in this case, while it is probably well accounted for by the existence of the circumstances before mentioned, it is to be observed that such lapse is only permitted in equity to defeat an ac-

knowledge right, on the ground of affording evidence of a presumption that that right has been abandoned; that it, therefore, never prevails when that presumption is outweighed by opposing facts or circumstances; and that, in general, a much longer time is necessary to found such presumption on, than had elapsed in the case before us.

The court will also remark that equity is not fond of taking advantage of forfeitures arising merely from a lapse of the time specified; and that it is the constant course of courts of equity to relieve against such forfeitures on making adequate compensation. In the case before us, while there is nothing to affect the appellant but the lapse of a few years, under circumstances, too, which in his opinion might have justified his delay; while he has not sinned against any given day prescribed to him by the other contracting party, and who, by failing to prescribe such a day, has consented that this right should depend upon all the circumstances existing in the case; the effect of a decision founded upon the lapse of time, in this case, would be to charge the appellant for nearly one fifth more land than he actually got, or, in fact, contracted to purchase; it would be to subject him to a bargain for the tract in gross, notwithstanding all the care he has taken to preserve his right to purchase by the acre; and to set up a bargain of hazard in the case of a sale made by executors, too, in preference to a fair and certain sale by the quantity. As to the objection that it was unfair and illegal for the appellant to make this election after he had, by an experimental survey, in some degree ascertained the quantity of land, the court is of opinion that a right to this is inferable from the mere circumstance that time was given him to make the election. It could never be contended that in judging concerning the exercise of that right, he would have been prohibited from viewing or stepping off the land, for example, and those modes of ascertainment differ only in the degree of certainty from an experimental survey. In principle there is no difference. Indeed, if a given tract of land were of a square and regular form, it would not be too much to assert that nearly as much certainty might be obtained in relation to the quantity by stepping off the same, as by an actual survey; there is, therefore, nothing in the objection, independently of the consideration that the appellees had it in their power, before the sale, to have taken the same precaution and, consequently, to have insured themselves from any risk or loss arising from this conduct of the appellant.

With respect to the objection that the party had Fontain's survey before them at the time of the contract, and that the appellant is remunerated for the loss of the highland by the excess found by Fox's survey to exist in the low grounds, the court is of opinion that the former fact is not proved in the cause, and consequently that the inference predicated on it falls to the ground. But if that fact had been proved, the case of *Nelson v. Mathews*, in this court, 2 H. & M. 164 [3 Am. Dec. 620], is a direct authority that if a deficiency shall be found to exist, in the case of a sale, unattended by any particular circumstances, the average value of the whole tract is to form the rule, without regard to the circumstances that the deficiency was in this or that description of the land contained in the tract; and whatever may be the fact as to the relative value of the high and low grounds contained in the tract in question, under the contradictory and conflicting testimony contained in the cause (to say nothing of the act of frauds, as applying to the subject), it is not shown what the appellant's own ideas on the subject were at the time of the contract, had Fontain's survey been even then before him.

As to the pretense that the delay on the part of the appellant may have subjected Nathaniel Burwell, the executor, to a *devastavit*, that is neither proved in the cause, nor, if proved, would it be important. He undertook to know and to abide by the true construction of the rights of the appellant in regard to the premises; and it is not for him to complain of a delay, which, if it was not produced in part by his own acts, might have been put an end to, by his exhibiting to the appellant a title to the land, and demanding a conclusion of the whole business respecting it.

Upon the whole, the court reverses the decree of the court of chancery; and the following is to be entered as the decree of this court:

"It is ordered and decreed that the injunction be made perpetual, and that the appellee, Nathaniel Burwell, administrator *de bonis non* of Lewis Burwell the elder, out of the assets in his hands yet unadministered, pay to the appellant so much of the sum of one thousand five hundred pounds, fourteen shillings and ten pence, as shall remain after deducting the judgments enjoined, with interest on the whole or any part thereof, from the time the appellant shall appear to have been in advance; the amount to be ascertained under the direction of the court of chancery; and it is ordered and decreed

that the appellant have leave to make the representatives of Lewis Burwell the elder, and the representatives of Robert Cary & Co. (the mortgagees of the premises), parties for the purpose of obtaining a title to the land purchased of the executors of the said Lewis Burwell the elder, and a release of the mortgage made to the said Robert Cary & Co., by the said Lewis Burwell in his life-time."

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In *Thornton v. Winston*, 4 Leigh, 157; *Thompson v. Meek*, 7 Id. 423, this case is relied upon as to when a renunciation by executors will be presumed. In *Watson v. Hoy*, 28 Gratt. 704, 713, it is cited, showing first that in equity contracts of hazard are discountenanced, and as to the rule for making compensation.

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## TAYLOR v. COLE.

[4 MURFORD, 351.]

**ESTOPPEL OF MORTGAGEE.** — If a mortgagee, in consequence of assurances that he shall receive his money from another quarter, permit the mortgagor to sell the premises, without making known his claim, the purchaser will be protected, notwithstanding the fund from which the mortgagee expected payment fail.

**APPEAL** from a decree of the superior court of chancery dismissing Taylor's bill. The case appears from the opinion.

*Wirt*, for the appellant.

*Wickham*, *contra*.

**COALTER, J.** In this case it appears that the appellant shortly before the death of Alexander Massenburg, purchased from him, for the consideration of one hundred pounds, a certain real property in the city of Williamsburg, which he soon after sold to one James Young, who obtained possession thereof with the knowledge of the appellee, in the life-time of said Massenburg. It also appears, that about ten years previous to this transaction, Massenburg had mortgaged the premises to the appellee, together with three slaves, some cows, and all his household and kitchen furniture, with a general clause embracing "all the movable property in his possession," to secure the payment, within a few months thereafter, of four hundred and twenty-eight pounds, sixteen shillings, said to be then due.

It further appears, that although the appellant had implied notice of this mortgage, it having been dully recorded, he was in reality ignorant thereof; that the appellee knew of his ignorance, as also of his ignorance of his alienee Young, at the time of their said purchases, but was prevailed upon by the solicita-

tions of Massenburg, not to make known his claim, he promising to pay him out of a larger fund which he said was at his command; on which promise he relied, but was deceived by the said Massenburg, who, in fact, had no such fund; and he never made known, or asserted his claim, until after the death of the mortgagor. It also appears that the appellee permitted the mortgagor, before the sale of the real property aforesaid, to sell at least one of the slaves, and the other personal property, which latter was a public sale, and at which sale it does not appear that he asserted his claim under his mortgage, although he took the bonds in his own name. But Massenburg afterwards asserted his right to those bonds, and gave an order to one of his creditors to receive part of them in payment of his debt, which the appellee offered to assign, without, at that time, asserting any right to them by virtue of the mortgage, though he now says, in his answer, that they were taken in part discharge of the mortgage, but afterwards loaned to Massenburg.

Stripping this case, then, for the present, of the matters hereinafter stated, going to destroy the credit of the answer, and to show that the transactions of the appellee were in other respects not fair, and that probably either nothing was in reality due to him, or that he had sufficient in his hands to pay himself, and not deciding whether this parol agreement, not to assert his claim (which is admitted in the answer), amounted to a discharge of the mortgage, and a relinquishment of his claim under it, so as to enable Massenburg to sell; stripping it also of the lapse of time which had occurred, and of those other public and notorious acts of abandonment and waiver of claim as to the other property, all tending to produce a belief in the world, either that the mortgage was discharged or abandoned, and considering a naked case of a mortgagee who, with knowledge of an actual fraud about to be committed on an innocent purchaser, is induced, by promises and persuasions of the perpetrator, not to make known or assert his claim until after the death of the mortgagor, so as to deprive the purchaser of an opportunity to secure himself, and of the aid of the mortgagor in unraveling a stale and dubious transaction, I would hesitate much before I would say that the conscience of such a bystander was not affected by such transaction. His case, as it at present appears to me, would differ widely from the case of one who only knew that another was about to purchase lands on which he had a mortgage recorded, and remained quiet. This latter might be justified in presuming that such purchaser

had notice of and would guard against the effects of the prior deed; and it might not be his duty to inquire whether he had actual notice or not. If such prior incumbrancer be present at the time of the purchase, and fail to assert his claim, the purchaser with actual notice of the deed might presume an abandonment on his part, and be thus induced to conclude the bargain, but where there is no actual notice, the presence of the prior incumbrancer has no influence on the mind of the purchaser; so that, had Cole been present at this sale, that circumstance would have had no effect on the mind of the appellant, though it would have finally operated in his favor. Is the appellee's conscience less affected, then, when he knows the purchaser is deluded, and is induced, by persuasion and promises, to contribute, by his silence, to the consummation of the fraud, which he might have prevented or arrested, than it would be had he been present at the sale, as he could in that case say, "The purchaser was ignorant of my claim, and therefore my presence and silence was no inducement to the contract?" The shade of difference would seem too small to be noticed. His speaking out when present is for the selfish purpose of securing himself, not to guard his conscience by doing an act of justice towards the person about to be deceived.

But without intending absolutely to decide this point, yet if, in addition thereto, and to the other strong evidences of waiver and abandonment above mentioned, there are other matters tending to impeach the justice and fairness of the appellee's claim, in its origin, and of his transaction, thereafter, I cannot, under all the circumstances, hesitate to vacate the mortgage, at least so far as respects the appellant.

Upon the whole I think the decree is erroneous and must be reversed, and the mortgage declared void as it respects the appellant.

ROANE, J. I concur in the opinion just delivered, on the ground that the appellee permitted Massenburg to sell the lot in question to the appellant. He not only gave his permission, but did it under an expectation of receiving his debt from another quarter; the prospect of which formed the consideration, or inducement, on which the permission was given. It was competent for him to give up his lien arising from the mortgage, and look to another fund for payment; and it is of no consequence that that fund has been found delusory and insufficient. Neither is it of any consequence that the appellant was not privy to, or connusant of the particular transaction by which the re-

lease was effected. As well might it be said that a subsequent purchase or incumbrancer cannot receive the benefit resulting from an actual payment of the mortgage-money, unless he had notice thereof or was a party thereto. That case differs from the present only in degree, in principle they are the same. The one is that of an actual payment of the money, the other is equivalent to a payment, in favor of the subsequent purchaser, by construction and operation of law. In all questions touching the payment or discharge of a mortgage, the mortgagor and mortgagee are the proper and sufficient parties; although the case may be made more strong in favor of the subsequent purchaser by making him a party thereto also. In permitting Massenburg to sell, the appellee consented to abandon the mortgage; otherwise he would take advantage of a fraud committed by himself, or at least perpetrated under his own permission and procurement; for Massenburg was not only permitted and encouraged by him to sell, but the appellant was also in some degree induced by him to purchase; for his (the appellee's) acts in permitting Massenburg to sell, as his own, property comprised in the mortgage, had a tendency to inspire the appellant (in common with others) with a belief that the mortgage had been satisfied. It would be monstrous, therefore, to permit the appellee now to disturb the contract, in which one party had been encouraged to sell, and the other induced to purchase, the subject in controversy, by acts of permission or connivance, flowing from himself. On these grounds, and without passing any opinion as to the justness of the debt which is purported by the mortgage to be due to the appellee, I am of opinion to reverse the decree, and declare the mortgage void as to the appellant and those claiming under him.

FLEMING, J., on account of the mortgage having been of record, dissented.

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### COOK v. DARBY.

[4 MURFORD, 444.]

**TRESPASS BY COMMON CARRIER.**—Where it appeared that a common carrier fraudulently opened certain packages and casks intrusted to his care, and took therefrom a part of their contents and converted the same to his use, but it did not appear that the contents were feloniously carried away, such offense was held to amount to a trespass, and not larceny.

**ACT OF LIMITATIONS.**—The act of limitations may be pleaded in bar to an action, against a common carrier, for fraudulently embezzling goods intrusted to his care.

SUPERSEDEAS to a judgment of the superior court of law affirming the judgment rendered in favor of Darby in an action of trespass on the case brought against Cook. The case appears from the opinion.

*Wickham*, for the plaintiff in error.

*Upshur*, *contra*, cited *Heath v. Heath*, 2 Ch. Cas. 20; *Parker v. Ash*, 1 Vern. 256.

By Court, FLEMING, President. As it is stated in the bill of exceptions to have been proved in this case that the plaintiff in error opened certain packages and casks, and took therefrom a part of their contents, that act might have amounted to larceny, although the said packages and casks were delivered to him as a common carrier, had it been also stated and proved that the said contents were by him feloniously carried away; but as it is only stated to have been proved that he converted the same to his own use, which does not necessarily imply a felony, the court is of opinion (without deciding whether such larceny would have merged the civil injury or not), that the offense proved at the trial and stated in the declaration, only amounted to a trespass and conversion; and, consequently, that the action will lie; and that upon this point there is no error in the judgments of the said county court; but the court is of opinion that the plea of the act of limitations well applied to this case, being one of a mere bailment and conversion; and that there is error in the judgment of both courts in having held the contrary.

Both judgments reversed; and cause remanded to the superior court of law, and from thence to the county court, in order to have a new trial therein, on which no such instruction as that last mentioned is to be given.

CASES  
IN THE  
SUPREME COURT  
OF  
NORTH CAROLINA.

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JONES *v.* CRITTENDEN.

[1 CAR. LAW REPOS. 385.]

**SUSPENSION LAW UNCONSTITUTIONAL.**—An act “to suspend executions for a limited time,” commonly called the suspension act, is unconstitutional, as being in conflict with the clause of the United States Constitution forbidding a state passing any “law impairing the obligation of contracts.”

THE case is stated in the opinion.

By Court, TAYLOR, C. J. The law of which the defendant claims the benefit, was passed in 1812, and provides that any court rendering judgment against a debtor for debt or damages between the thirty-first of December in that year and the first of February, 1814, shall stay the same until the first term or session of the court after the latter period, upon the defendant's giving two freeholders as securities. The act also contains sundry details not necessary to be recited.

In deciding the momentous question, whether the will of the legislature, as expressed in this act, be incompatible with the will of the people, as expressed in their fundamental law, the constitution of the United States, we disclaim all right or power to give judgment against the validity of a legislative act, unless its collision with the constitution appear to our understandings manifest and irreconcilable. On the contrary, if patient and dispassionate consideration of the subject produce anything short of entire conviction, we hold ourselves bound to support a law.

The constitutional will of the legislature, inclination, not less than duty, prompts us to execute; for identified as its members

are with the other citizens of the community, and faithfully representing their feelings and interests, we can never allow ourselves to think that the acts proceeding from them can be designed for any other purpose than the promotion of the general welfare, or can result from other than the purest and most patriotic motives.

We have deliberately viewed the question in every light in which the arguments of the learned counsel on both sides have presented it, and aided by such additional information as our own research or reflection could furnish; the result of our opinion is that the law in question is unconstitutional, and cannot be executed by the judicial department without violating the paramount duty of their oaths to maintain the constitution of the United States. This conclusion we derive, first, from the plain and natural import of the words of the constitution of the United States; and secondly, from a consideration of the previously existing mischiefs which it was the design of that valuable instrument to suppress and remedy.

Amongst the important objects which the people of the United States designed to accomplish by adopting the constitution, that of establishing justice holds a conspicuous rank. This appears from the solemn declaration of the people themselves in the preamble to that instrument. The enlightened statesmen by whom it was originally framed, had reaped abundant instruction from history and experience. Long accustomed to contemplate the operation of those master principles and comprehensive truths which form at once the defenses and the ornament of human society, and which alone can justly form the basis of the social compact, they designed to give them practical effect for the benefit of the American people—to consecrate and make them perpetual. They well knew that while the principle of justice is deeply rooted in the nature and interest of man, and essential to the prosperity of states, it forms the strongest and brightest link in the chain by which the Author of the universe has united together the happiness and the duty of his creatures.

To give a proper direction to these general principles the clause in the constitution which presents the question before us was inserted. Some of its provisions are transcribed from the articles of confederation; others are added because experience had demonstrated that without them the union of the states would be imperfect. The words are: "No state shall enter into any treaty, alliance or confederation; grant letters of marque

and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," etc.

The obligation of a contract may be impaired by various modes and in different degrees; and the restrictive clause in the constitution does, according to our apprehension of its meaning, annul every act of a state legislature which shall thereafter produce that effect plainly and directly in any degree. When, therefore, the validity of the law is maintained by the defendant's counsel, because it does not allow a debtor, who promises to pay in one thing, to pay in another; because it does not absolutely restrain the debtor from paying according to his engagement; or because it does not allow a third person to interfere between the contracting parties—the answer is, that the examples cited furnish stronger instances of a violation of the constitution than the case before us; they may with stricter propriety be called cases of annulling a contract; but they certainly do not prove that the obligation of contracts is not impaired by the act under consideration.

Whatever law releases one party from any article of a stipulation, voluntarily and legally entered into by him with another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever correspondent to and co-extensive with the duty of the debtor. The first principles of justice teach us that he to whom a promise is made, under legal sanctions, should signify his consent, before any part of it can be rightfully canceled by a legislative act.

The binding force of a contract may likewise be impaired by compelling either party to do more than he has promised. If an act postponing the payment of debts be constitutional, what reasonable objection could be made to an act which should enforce the payment before the debt becomes due? If, notwithstanding the constitutional barrier, it is competent for the legislature to hold out to all debtors, that although they fail to pay their debts when they become due, and their creditors are in consequence compelled to sue them, they shall nevertheless be indulged with a certain time beyond the judgment, superadded to the ordinary delays of the law; may not the legislature with equal authority announce to all creditors the right of suing for their debts and enforcing payment before the day? Yet the rights of both parties established by the contract, are,

in the eye of justice, equally sacred; and whether those of the creditor are sacrificed to the convenience of the debtor, or the subject be reversed, we are compelled to think that the constitution is overlooked.

No unimportant part of the obligation of every contract arises from the inducement the debtor is under to preserve his faith. With many persons, and it may be hoped the greater number, a sense of justice and respect for character form motives of sufficient strength; but how rarely does it happen that a man lending his money, or selling his property on credit, estimates such motives so highly as to deem them a safe and exclusive ground of reliance! In most cases he would reserve both money and property in his own possession, were he not assured that the law animates the industry and quickens the punctuality of his debtor; and that by its aid he can obtain payment in six or nine months. Hence the well-considered ceremonies of bonds, mortgages and deeds of trust, more useful as the instruments of coercive justice, than as preserving the evidences of contract. The act under view destroys this assurance, and while it produces a state of things the existence of which at the time of contract would have restrained the creditor from parting with his property, it encourages the debtor to relax his efforts to be punctual. It weakens his inducements to fulfill his engagement, and thereby impairs its obligation.

The right to suspend the recovery of a debt for one period, implies the right of suspending it for another; and as the state of things which called for the first delay may continue for a series of years, the consequence may be a total stagnation of the business of society, by destroying confidence and credit amongst the citizens.

An argument urged and much relied on by the defendant's counsel is, that the law in question bears only on the remedy, and is therefore within the sphere of legislative authority. But if in so doing it violates the constitution, it is not less invalid than if it directly touched and annulled the right. Every one will agree, that a law which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution; that a law which should limit the recovery of all debts to so short a period after its passage, that it would be impossible, according to the course of the courts, to obtain a judgment, would also be null and void; though such laws ostensibly bear only on the remedy, yet they do in reality annihilate the right. The law before us,

it is conceded, does not go to the extent of either instance; yet it certainly diminishes the importance and the value of the right. It is difficult to conceive how a law could otherwise impair an existing right than by withholding the remedy, which is in effect to suspend the right.

The undoubted right of the legislature to alter and reform the judicial system may, it is said, produce delay in the execution of a contract, equal to that which results from the present law; and it is urged that all such acts must, upon the same principle, be declared unconstitutional.

We cannot acquiesce in the final conclusion drawn from these premises, which, without hesitation, we acknowledge to be correct. All such laws the legislature have an unquestionable right to enact, a right which the people have never surrendered, and the exercise of which is not forbidden by the constitution of the United States. But it must be considered that the primary and essential object of all such laws, is the promotion of the administration of justice, its advancement and improvement. If delay grow out of them; if anything that bears the semblance of a violation of contract follow in their train, it is merely the unintended incident and consequence of the exercise of a lawful authority. It is different with the law before us; its very design, as expressed in the title, is to do that against which the constitution has opposed its veto.

Many analogous powers, it is argued, have long existed in the state under the authority of the law; that their exercise has been highly convenient to the citizens, and has been universally acquiesced in; that all these must cease to have effect if the suspension law is unconstitutional, to the manifest detriment of the community. If such effects follow from our decision, there are no citizens in the state who will more sincerely deplore them than ourselves. But we feel too deeply what we owe to the responsibility of our stations, to the obligation of our oaths, and the rights of the people and their posterity, to be turned aside from what we believe to be the post of duty by any consideration of the consequences that may arise from continuing it. Let all these cases be patiently examined, and we think it will be seen that their analogy is not complete; that they may still exist, and the powers under them be rightfully exercised, notwithstanding the decision in the present case.

The first instance is the stay of execution which justices are allowed to grant on judgments rendered by them. But here the creditor is not concluded; he may appeal to the county

court. Besides, the constitution of the United States, in the section under consideration, employs the future tense: "No state shall pass laws," etc. It does not repeal those conflicting laws which were then in force; though several of the states did, in obedience to its spirit, forbear to re-enact laws in hostility with it. The law giving this power to magistrates was enacted long before the constitution was adopted.

Another example cited is that of the power constantly exercised by a court of chancery in giving time to a mortgagor, on a bill filed against him to foreclose, to pay the debt before the decree is made absolute, or the land ordered to be sold. Such a power has been exercised by that court from very ancient times, and was one of the modes of administering a remedy on those contracts known to the parties when they entered into it, and it is a necessary consequence of the principles on which the constitution of the court compels it to decide the rights of parties to a mortgage. It is also in strict conformity with natural justice, for the land mortgaged being only a collateral security for the payment of the debt, and so understood by the creditor, he cannot be injured if his debt and interest are paid. It is upon the same principle that a court of chancery exercises its jurisdiction of relieving against a penalty, because it is designed to secure the payment of money, and the court allows the creditor all that he expected when he made the contract. The intention of the parties is in all respects effectuated, and the obligation of the contract is enforced precisely in the way both creditor and debtor knew it might be enforced when they entered into it. Another point of view may probably render the subject clearer. Such an order in the court of chancery is not at all directed against the contract, but it is the answer of the court to a mortgagee who brings his bill against the mortgagor, on whom it prays the court to lay hands, and make him, if he intends to redeem, to do it then, or ever after remain silent. When the court, therefore, is applied to for the purpose of lending its aid to an individual, in a matter which he deems necessary for his peace, it is clearly in its power to say upon what terms such interposition shall be extended. With the utmost propriety, then, the court answers, it cannot be that a decree of foreclosure shall be made in the case without giving reasonable time to the mortgagor to redeem. If there are special cases in which a court of chancery gives further time upon a bill to redeem, it must be upon the ground that the substantial understanding and agreement of the parties is that of a

security for the money and the interest accruing, without having reference to any particular day of payment, and that the safety of the debt is only intended to be provided for by the mortgage. Hence the mortgagee takes a bond for the debt, and the existence of the mortgage is no objection to the recovery of the debt. The giving further time on a bill to redeem has no influence on the bond, nor does it affect any proceeding to recover the debt in a court of law. Both jurisdictions move distinctly within the sphere of their respective orbits. The court of equity applies itself to the conscience of the party, requiring of him substantially to accept and perform what he originally expected, and what was intended by both parties; thereby enforcing rather than impairing the contract.

The act of 1789 has been pointed out to the notice of the court, as containing a similar exercise of legislative power with the one under consideration. That act provides that no execution shall be levied on property of a minor in the hands of his guardian, until twelve months after a judgment on the *scire facias*. An examination of the purview of this law will show that it is supplementary to the act of 1784, by which a remedy is given against heirs, not formerly possessed by the creditor. The heir was at first liable only where he was expressly bound in the obligation of his ancestor, and had also assets by descent. By these laws, which must be construed together, the land in possession of the heir is made liable to creditors after the personal estate is exhausted. That a new remedy given by the legislature should be qualified or limited in any way they deem expedient seems perfectly unexceptionable. Besides, to whom is the indulgence extended? To minors, whose rights the common law, even to a greater degree than equity, has always considered as under its peculiar protection? Its language is: "In the case of infants, the parol is to demur, and the infant is not bound to answer till full age, and the register, parliament, and common law give no execution against an infant heir, although the debt were clear and indisputable as by a judgment or statute:" 2 Treatise on Eq. 268.

The right to pass this law is further derived from the fifth section of the declaration of rights, "that all power of suspending laws or the execution of laws, by any authority without the consent of the representatives of the people, is injurious to their rights and ought not to be exercised." This article, like several other excellent ones in the same instrument, is taken *mutatis mutandis* from the declaration of rights, established by

the parliament of England at the beginning of the reign of William III., and was especially designed to secure them against a branch of prerogative, which, though exercised by the legal authority, from the time of Henry III., had been employed in the preceding reign in a manner the most odious and oppressive. With the example of the revolution in England, and the causes producing it, fresh in their remembrance, the convention of this state raised this bulwark against a similar assumption of authority. But the term "laws" must signify such acts as the legislature have authority to pass, for that cannot be called a law, which the constitution has forbidden to be enacted. The term "suspend" implies that the act suspended, once had an effectual and constitutional existence. So that if, before the adoption of the federal constitution, the legislature had passed an act inconsistent with the constitution of the state, such act could not claim the authority of a law. If, for example, they had directed the judiciary to try all criminals without the intervention of a jury; if they had declared that certain acts theretofore done, and lawfully done, should, nevertheless, be punishable; that no prisoners should be bailable; it would, we apprehend, have been the sacred duty of the judiciary to refuse to execute such acts. The persons who have filled that department, from the cessation of the colonial government to the present time, have acted in conformity with this principle, as the judicial records of the county testified. A law is defined a rule of action commanding what is right, and prohibiting what is wrong. But the rule prescribed in the supposed cases, would have commanded what was wrong, and prohibited what was right, according to the fundamental law.

Every article in the declaration of rights, as well as the constitution of the state, is subject to the paramount control of the constitution of the United States, which, being the last solemn expression of the will of the people, annuls and destroys everything clearly irreconcilable with it.

The definition of a contract, as given by M. Pothier, a writer on the civil law, is quoted to show that the time of payment is not of the essence of a contract. The writers on that law have made various subtle distinctions relative to the qualities of a contract; but as we cannot perceive that any inference can be drawn from the words of Pothier, applicable to this subject, except such as other parts of the work explain away, a very brief notice of it will be sufficient. His words are: "There are three different things to be distinguished in every contract,

things which are of the essence of the contract; things which are only of the nature of the contract; and things which are merely accidental to it." After explaining at length the essence and the nature of the contract, he illustrates what he means by the accidental things, which, he says, are only included in the contract by express agreement. "For instance, the allowance of a certain time for paying the money due; the liberty of paying it by installments; that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it, without being particularly expressed." The just inference from this passage is, that even the accidental things, if inserted in the contract, form a part of its obligation. That the civil law viewed them in this light, is evident from other parts of the same writer, where he distinguishes between a term of right and a term of grace, the first making a part of the agreement, the latter not: 1 Pothier, p. II., c. 8, Evans' ed.

To this statement of the reasons why the analogy of the cases relied on appears to us imperfect, it is only necessary to subjoin this general remark, that none of them have been directly brought into judgment; and if they should appear to be infringements of the constitution, it cannot follow that the acquiescence in them will justify a repetition. The construction we give to the constitution would have been adopted by us from a consideration of the instrument itself, but we think it fortified by the collateral illustrations furnished by the other ground of our opinion.

[The court here cited historical statements as to the objects of the framers of the constitution, which, however, are now very familiar, and then proceeded.]

We have thus given the reasons of our opinion, with as much clearness as brevity as the many important causes pressing upon our attention would enable us to do in the intervals of adjournment; for, until the present term, we knew not the opinions of each other. We should have rejoiced if this judgment could have been put in a course of revision before a superior tribunal, or that so interesting a question could have been decided, for the first time, by judges of more skill and learning than we pretend to possess. Such as it is, we submit it to the candor and good sense of our fellow-citizens, who, although they may think us in error, to which we are subject, in common with the rest of the human family, will do us justice to believe that such error is neither willful nor agreeable. We have dis-

charged what we believe to be an imperious duty to our country, and the *mens conscia recti* forms our consolation and support.

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The courts of this country have differed very much as to the constitutionality of what are termed "stay laws," such as the law in this case; and until lately it was doubtful how far the supreme court would hold such laws valid; but a late important decision, *Edwards v. Kearzey*, 96 U. S. 595, leaves no doubt as to their unconstitutionality. In this case, it appeared that a clause of the new constitution exempted a homestead, not exceeding in value one thousand dollars, from execution, which was much larger in value than that exempted, at the time when the contract was entered into. This was held to impair the obligation of the contract, and was in conflict with the federal constitution. The court now laid down the broad principle that the remedy subsisting in a state when and where a contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution of the United States, and is therefore void.

Mr. Justice Swayne, delivering the opinion, says:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breadth of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are the same thing. 'Want of right and want of remedy are the same thing;' 1 Bac. Abr., tit. Actions in General, letter B.

"In *Von Hoffman v. City of Quincy*, 4 Wall. 535, it was said: 'A statute of frauds embracing pre-existing parol contracts, not before required to be in writing, would affect its validity. A statute declaring that the word 'ton' should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy, would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract, would relate to the remedy.'

"It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement: *Von Hoffman v. City of Quincy*, *supra*; *McCracken v. Hayward*, 2 How. 508. In *Green v. Biddle*, 8 Wheat. 1, this court said, touching the point here under consideration: 'It is no answer, that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests.'

"One of the tests that a contract has been impaired is, that its value has, by

legislation, been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force:" *Planters' Bank v. Sharp*, 6 How. 301. "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account. These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case; and are they not decisive of the question before us? We will, however, further examine the subject.

"It is the established law of North Carolina, that stay laws are void, because they are in conflict with the national constitution: *Jacobs v. Smallwood*, 68 N. C. 112; *Jones v. Crittenden*, 1 Law Repos. 385; *Barnes v. Barnes*, 8 Jones L. 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law."

Referring to this subject, Cooley, Const. Lim. 292, says: "A statute which authorizes stay of execution, for an unreasonable or indefinite period, on judgments rendered on pre-existing contracts, is void, as postponing payment, and taking away all remedy, during the continuance of the stay," citing *Chadwick v. Moore*, 8 Watts & S. 49; *Bunn v. Gorgas*, 41 Pa. St. 441; *Stevens v. Andrews*, 31 Mo. 205; *Hasbrouck v. Shipman*, 16 Wis. 296. And to the same effect, see *Aycock v. Martin*, 37 Ga. 124; *Coffman v. Bank*, 40 Miss. 29; *Canfield v. Hunter*, 30 Tex. 712; *Webster v. Rose*, 6 Heisk. 93; *Garlington v. Priest*, 13 Fla. 559; *Hudspeth v. Davis*, 41 Ala. 389; *Strong v. Daniel*, 5 Ind. 348.

In *Breitenbach v. Bush*, 44 Pa. St. 313, it is held that a statute passed in the time of a civil war, enacting that no civil process shall issue or be enforced against any person mustered into the service of the state or of the United States during the term for which he is engaged in such service, and thirty days thereafter, is valid, for the stay is neither indefinite nor unreasonable. So in *State v. McGinty*, 41 Miss. 435. But in *Hasbrouck v. Shipman*, 16 Wis. 296, a statute exempting all persons from civil process while they are in the military service of the United States, or of the state, is void, for the suspension is indefinite; and a similar doctrine is laid down in *Clark v. Martin*, 49 Pa. St. 299, where it is held that when the enlistment is for the war, the time is indefinite, and a statute providing a stay of civil process for that time is unreasonable and invalid. So in *Davis v. Pierse*, 7 Minn. 13; *Wilcox v. Davis*, Id. 23; *Vernon v. Henson*, 24 Ark. 242; but *contra* in *McCormick v. Rusch*, 15 Iowa, 127.

It is thus seen that there is some conflict in the decisions on this point. Probably the safest general rule to lay down is that where there is some public necessity, a statute suspending legal process for a definite time, would be upheld, as in *Johnson v. Duncan*, *post*, and this is in harmony with the view of Judge Cooley, quoted *supra*.

## PHILLIPS v. SMITH.

[1 CAR. LAW REPOS. 475].

**BREACH OF COVENANT OF WARRANTY.**—On a breach of the covenant of warranty, after an eviction, the measure of damages is the consideration paid, with interest, without considering the increased value of the land at the time of eviction, whether such increase arises from the ordinary and regular rise of property or from improvements or otherwise.

Two cases presenting similar facts came before the court at the same time upon special verdicts. The question raised appears from the opinion.

By Court, TAYLOR, C. J. The question we are called upon to decide in these cases is, whether upon an eviction the seller of land is responsible under his warranty, to damages to the amount of the increased value from the time of sale, and consequently for the improvements made on the premises; or whether he is bound to pay the purchaser only the value of the property at the time of sale? The British authorities do not furnish any direct decision upon this subject in relation to the action of covenant; and that it is not easy to deduce from any analogy they afford the correct rule of adjudication, is proved by the diversity of opinion, prevalent in the American tribunals, where the question has occurred. It has been investigated by learned and laborious counsel, and illustrated by the researches of judges of the highest order of intellectual excellence; yet in Massachusetts, Connecticut and South Carolina, the rule is to allow the value at the time of eviction; in New York, Pennsylvania and Virginia, the value of the land at the time of purchase, forms the measure of damages.

Equal difficulty, it is probable, was experienced on this subject in first laying down the principles of the civil law, a system generally characterized by its intrinsic excellence, and by being founded in many respects on the just grounds of rational jurisprudence. An arbitrary rule was resorted to which limited the damages to double the value of the thing sold; but the avowed principle which gave rise to the rule was not to bind the parties beyond what they might reasonably expect the damage to amount to, from the non-performance of the contract. The principle itself is certainly conformable to natural equity, although the rule built upon it seems better calculated to put an end to strife and uncertainty than to reach the merits of particular cases. Indeed, we cannot hope that the practical application of any rule will obviate all inconvenience and injustice;

whether the damages be referred to the time of sale, or to the time of eviction. But mature consideration has convinced us that to allow the purchaser the original value of the land has the strongest sanction from legal analogy, is most consonant to the mild and temperate spirit of the common law, and less likely to produce public inconvenience or individual mischief, than any other rule we could adopt. The latter consideration, it is true, ought never to influence a decision in cases where the law speaks a clear and explicit language; but no one will deny that it merits the highest attention, where neither scale of legal reasoning preponderates.

The only remedy by the ancient law, for a person claiming under a warranty, was the writ of *warrantia chartæ*, in which land itself was recovered, equal in value to the land sold at the time of sale. There is no variance in the books upon this point. In a warranty to the feoffee made by the feoffor, if upon voucher special matters be shown by the vouchee, that when he entered into the warranty the land at the time of the feoffment was worth only one hundred pounds, and now, at the time of the voucher, it is worth two hundred pounds, by the industry of the feoffee, the plaintiff in a *warrantia chartæ* shall recover only the value as it was at the time of sale: Jenk. Cent. 35. If feoffer improve by buildings, yet dower shall be as it was at the seisin of the husband; for the heir is not bound to warrant, except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffer than he would recover in value: Co. Lit., note 193. The leading cases on this subject are copiously and elaborately stated by Mr. Luther Martin, in an opinion given by him to be found in that useful work, Mr. Hall's Law Journal.

The *warrantia chartæ*, which was a mixed action, calling for judgment on the warranty, as well as for damages, has given place to the action of covenant, which pledges the personal as well as the real assets to the performance of the covenants. In this respect the remedy is more effectual and obligatory than the ancient one; but there does not seem to be any adequate reason for adopting a different rule of compensation. The real intention and honest understanding of the parties ought always to be considered in expounding and enforcing their contracts. Nothing could be more unreasonable than to interpose a mode of computing damages which in all probability was not contemplated by either of the parties at the time of the contract, and which, if then brought into view, would have prevented its

completion. It is certainly repugnant to our ordinary conceptions of justice that a person who sold land of little worth a few years ago, which now, by cutting a canal or other expensive improvements, hath increased in value beyond all reasonable anticipation, should be liable to the purchaser to the full amount at the time of eviction. It would be doing violence to the spirit and general course of such transactions to imagine that the seller, at least, calculated upon such a result. He has no control over the conduct of the purchaser, who may conduct his improvements in any manner, and push them to any extent, which views of profits, pecuniary ability, taste or caprice may suggest.

A wealthy man may purchase from one in moderate circumstances, a spot of ground, on which he expends large sums of money, either with the view of commercial profit, or in the gratification of a luxurious and costly wage for improvement; and thus, when the defect in title is discovered the property is of greater value than the seller is able to pay. That the property should increase in value, and that the purchaser should improve it, were circumstances which might have been reasonably expected by the seller; but it is difficult to believe that he should, for an insignificant consideration, have calmly calculated upon the total ruin of himself and family, in the possible event of a future eviction of the purchaser. The truth is, that in fair sales, and to such alone can the rule now established apply, both parties have a confidence in the goodness of the title. The seller possesses no knowledge concerning it, which is not equally accessible to the buyer, who receives a warranty, that in the event of the title proving defective, he may be restored to the situation he would have been in had he never purchased. If according to the common apprehension of mankind, the purposes of a warranty were more extensive than this; if its design were to indemnify the purchaser for the loss of his bargain and the value of his improvements, would it not be customary to require something more than the security of the deed, when it was intended to incur great expense in improvement? Let the title continue unimpeached, the increasing value of the property is the gain of the buyer; the seller can claim no addition to the price. But if the title prove defective, the buyer will still recover the value of the land, as it was when he purchased, although it may be diminished at the time of the eviction. In both cases, the same rule of compensation should be applied.

Many cases have been stated, and may again be adverted to,

which demonstrate the extravagant hardship of a contrary rule. Land is sold for a small price, on which, before eviction, a gold mine may be discovered, as in Cabarrus county; a flourishing town may be erected on it, as is the case in many parts of the state; or it may become unexpectedly valuable for agricultural purposes, by being connected with a navigable stream, of which an instance occurs in that immense body of land lying on Lake Phelps, and which, before the canal was cut connecting it with Albemarle Sound, was held in comparatively small estimation. Indeed, without any extraordinary means of improvement, the increase in the value of lands, in many parts of the state, has been so great and rapid, as to baffle calculation and deceive foresight.

Those who are conversant with courts of justice, know that the early patents produced on trials in some parts of the state, have studiously left out lands then deemed of no value (not worth the taxes), which now, by draining, or in some instances, by the increased evaporations from clearing the grounds, have become the most productive.

Any other rule of computing damages, than that of the value at the time of sale, would, in our opinion, produce the most glaring injustice, and the wide spread ruin and impoverishment of families. Nor is the principle varied because the jury, in one of these cases, have found that the increased value of the land, arose from the ordinary and regular rise of property. Some rule must be established as a guide to the community; for it would produce endless inconvenience to constitute the jury chancellors in each particular case, and it is impossible to take any intermediate period between the sale and eviction.

We have adopted that which refers to the sale, from a belief that if the authorities do not amount to precise demonstration on the point, they at least raise a strong probability that the law is so; and because such rule appears to us equitable, rational, and most consonant to the views and understanding of the contracting parties.

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See *Horsford v. Wright*, and note, 1 Am. Dec. 8, where a different rule is held. See, also, *Henning v. Withers*, post.

## SULLIVAN v. MITCHELL.

[1 CAR. LAW REPOS. 482.]

**INSOLVENCY OF MAKER.**—Ordinarily if the maker of a note has become insolvent, has absconded, or refused to make payment, this will be sufficient to charge the indorser upon due notice of the fact.

**PERSONAL DEMAND UNNECESSARY.**—A personal demand on the maker is not necessary; it is sufficient if made at his house, but if the house be closed and the maker absent some endeavors must be made to find him.

**NOTE PAYABLE AT A PARTICULAR PLACE.**—Whenever a bill or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary, whether the maker live at the same place or a different one.

**NOTE PAYABLE AT A BANK.**—A note made payable at a particular bank must be presented at the bank for payment to render the indorser liable.

**MOTION** for a new trial in an action by the indorsee against the indorser of a promissory note.

The note was made payable and negotiable at the bank of Cape Fear. At maturity, the holder was at Wilmington, where the maker had usually resided, but where, at that time, he had neither a residence nor place of business. The defendant then informed the plaintiff that the maker of the note was at sea, and that it would be a hardship to have to pay the money, as he had already paid large sums on his account. No other demand was made on the defendant, nor was any other notice given to him. No demand was made at the bank, and the material question was whether under these circumstances the indorser was liable.

**TAYLOR, C. J.** The nature of an indorser's engagement is, that he will pay the amount of the note, provided the holder cannot, after using due diligence, obtain payment from the maker; and that reasonable notice of this fact be given to the indorser, to enable him to charge the person against whom he is entitled to claim. Nothing should be neglected on the part of the indorsee, which might reasonably have been expected, to enable him to procure payment from the maker; if he refuse to make it, has absconded or become insolvent, and no delay occurs in apprizing the indorser of the fact, this, in ordinary cases, will be sufficient to make him liable to the indorsee's action. A personal demand is not essential, it being sufficient if made at the house; but if the house be shut and the maker has gone away, some further inquiry should be made concerning him, and some endeavor used to find him out, for he may have removed to another dwelling, and have been ready to pay the money: 2 Str. 1087. If it be proved that he has absconded,

nothing more is necessary, when no particular place is pointed out for the payment of the money; here it is part of the contract that the money should be paid at the Bank of Cape Fear; the maker might have appointed an agent at the bank to pay the money, or have deposited the amount to the credit of the holder. We cannot presume that this was not done, and as no application was made at the bank, which every one receiving the note might see upon the face of it, was necessary, it would be unreasonable to charge the indorser. It is in the nature of a special acceptance, which, in the case of a bill of exchange, the holder is not bound to receive, but having received it, he impliedly agrees to conform to its terms. Thus, if a man accept a bill payable at his banker's, the holder must present it there within the usual banking hours; and if he present it afterwards without obtaining payment, it is not evidence of its being dishonored so as to charge the drawer: 7 East, 385. If a demand be made at the place designated, although notice should be given to the indorser of the non-payment, yet no personal demand need be made of the acceptor, who has broken his contract, that the bill should be paid there. "If," says Marius, "a bill directs the payment at a certain place, it ought to be paid there, without other demand than at the place, though the acceptor lives at a place remote:" p. 26. And if he live in the same place, the law is the same as appears in 2 H. Bl. 509, where the person, at whose house the bill was made payable, was himself the holder of it; in which case it was held a sufficient demand of payment for him to inspect his books, and so find that he had no effects in his hands.

As the verdict below was improperly found for the plaintiff, there must be a new trial.

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See *Putnam v. Sullivan*, 3 Am. Dec. 206, where a demand was excused when the maker had absconded.

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## DEN v. BARNES.

[1 CAR. LAW REPOS. 484.]

**CONSTRUCTION OF TERM "HEIRS" IN DEVISE.**—A testator devised: "I give and bequeath to the children of G. W. L., provided he has any, if not, to the heirs of my sister S., the land which lies between the road, etc.," and it did not appear from the will that the testator knew of his sister S. being alive; it was held that the words "heirs" must be taken in its legal acceptation, and not as *descriptio personarum*.

**EJECTMENT** to recover a tract of land, claimed by the lessors of the plaintiff, under a will, the material clauses of which are as follows: "I give and bequeath to the children of G. W. Long, provided he has any, if not, to the heirs of my sister Stith, the land which lies between the road, etc." "Item—My brothers, Richard and George Long, are to pay out of the bequests I have made them, what debts I may owe." The testator had previously devised a tract of land to his brother Richard. The jury found, in a special verdict, that G. W. Long died before this suit was brought, without ever having had a child; that the testator's sister Stith is still alive, and that she, as well as her children, the lessors of the plaintiff, lived in the same neighborhood with the testator, who saw them almost daily; that the lessors of the plaintiff are the only children Mrs. Stith had either at the making of the will or at the death of the testator. On the trial of the cause below, objection was made to the introduction of parol evidence to show the knowledge of the testator as to his sister Stith being alive. The admissibility of such testimony was one of the questions submitted to the court.

*Browne and Drew*, for the plaintiff.

*Daniel*, for the defendant.

**SEAWELL, J.** In the argument which was made in this case for the defendant, it was contended that George W. Long took an estate for life, by implication, on account of his being directed to pay the testator's debts "out of the bequest made to him;" and that the limitation immediately to his children made it an estate-tail, which, by the act of 1784, became a fee-simple. Whether such effect resulted from the devise, or not, seems not material to consider. If such was the effect of the devise, it would then become necessary to inquire how the ulterior limitation would thereby be affected; for if by force of our act of assembly of 1784, words which, before the act, gave an estate-tail, are since made to pass a fee-simple, why should not the ulterior limitation upon an event which must take place during the life of George, be good by way of executory devise? Upon this part of the case, however, no opinion is intended to be given, as we are all of opinion the plaintiffs have no title. Nor does it, in my view, become important to decide the point in relation to the parol evidence; for if the testator had expressly mentioned in the will that his sister Stith was alive, and had given her a legacy, such circumstance could have had no influ-

ence, and I should then be equally clear the plaintiffs could not recover.

In construing a will, the intention of the testator is the material object, and this intention is to be collected, in the first place, from what he has declared, by giving to the expressions used their true import, as understood in law. But as words are the only medium by which the intention is to be conveyed, they will never be permitted to stand in the way when their import would pervert, instead of perform, what they were intended for. Therefore, if it should appear from the will of McKinnie Long that he intended the children of Mrs. Stith to take immediately on the death of George without children, though their mother should be living, such intent must necessarily control the meaning of the word "heirs," and therefore it could not be understood according to its technical meaning. It would then be evident the testator intended heir apparent or issue; but if no such intention can be collected from any part of the will, or from the fact found, then we can only look for the meaning of the testator from the words he has used, and must take that to be his intention which his words import. In the present case, the testator has used the expression "heirs," which is a word of legal import, and means those who shall have succeeded to the real estate of another by inheritance. Now, until it shall be shown that the testator did not understand the term he has employed, either by a reference to the whole will or from the fact found, he must be understood to have meant what he has said. From the will it is not pretended that any such inference is drawn; but it is contended that the fact of his knowing his sister then to be alive, as found, will have that effect. I can draw no such conclusion. The devise to the heirs of Mrs. Stith is not of that kind or description which, though the enjoyment is deferred, is to vest immediately; if it were, the testator's knowledge of her being alive would then show that he did not understand the meaning of the word he had used, as "*nemo est hæres viventis*." His intention, then, would be manifestly frustrated by allowing to his words their true meaning. It has, however, been contended that whenever the testator takes notice the ancestor is living, a devise to the heirs of such ancestor is to be considered as to his heirs apparent; and the cases of *Long v. Beaumont*, 1 P. Wms. 229, and *Den v. White*, 2 Bl. 1010, are cited as authorities.

If those cases proved that there was such a stubborn rule of law, I should certainly hesitate before I would decide otherwise

But they prove no such rule. They only determine that when it appears from the will that the testator intended the devisees' estate should vest immediately, though such devisees are called heirs, yet the estate shall go according to the intent of the testator, and by the word heirs will be intended heirs apparent, if their ancestors be then living.

The case of *Long v. Beaumont* is shortly this: The testator devises to trustees for twenty-one years, remainder to the first son of his own body, and his heirs male, and in default to the heirs of the testator's body, and in default of such heirs, to his cousin John Spark for ninety-nine years, remainder to his first son in tail male, and in default of such issue, to the heirs male of his aunt Elizabeth Long, and in default of such issue to his own right heirs. Beaumont, the defendant, was then heir apparent of the testator, and there was a devise of an annuity to him. The testator, in his will, took notice that his aunt, Elizabeth Long, was alive, by devising her also a legacy. Now, this case only proves (what has not been doubted in the examination of the case under consideration) that technical expressions are to bend to the intent of the testator; or in the language of Lord Coke, that the barbarous language of the testator is to be so moulded as to effectuate his intention. The case cited is that of a vested remainder in tail, to the heirs of the aunt of the testator, with remainder in fee to the heir at law, in default of such issue. I have said a vested remainder, because the estate was not liable to be defeated by any event, unless the limitation to the heirs of a person then alive made it contingent; and the court determined that there was sufficient upon the face of the will to discover that the testator did intend those he called "heirs" should take whilst their ancestor was living. The estate, therefore, vested at the death of the testator, though the enjoyment was postponed. In deciding that case, the court has determined that the word "heirs" may be made to mean children, issue, or heirs apparent, according to the intent of the testator; and as, in that case, the testator had postponed the heir at law, the then plaintiff, till the issue of his aunt was exhausted, the devise to the "heirs" of the aunt must be understood issue; for indeed no one else could take the estate. In aid of that construction, the testator's knowledge that his aunt was then alive, was relied on as a circumstance. The court also laid hold of the words lawfully begotten, as connected with the heirs of the aunt, which they said was equivalent to heirs then living.

The case from Blackstone was where the testator devised to his wife an annuity for eighty years, charged upon the premises; and after her death, an annuity of forty shillings per annum to each of his daughters, Elizabeth, Mary and Ann, for the same period, if they, respectively, live so long; and to her daughter Margaret, the defendant, an annuity for seventy years, if she and the testator's son, Richard, should jointly live so long. Subject to the said annuities, he devised the premises to Margaret for two years from and after his decease, with remainder to his son Richard, if then living, for ninety-nine years, if he lived so long; and subject to such ninety-nine years' term, he devised the same to his son Richard and his heirs male, and to the heirs of Margaret, jointly and equally, and to their heirs and assigns; and for want of heir male of the body of Richard, at his death, he devised the premises charged, etc., to the heirs and assigns of Margaret, lawfully begotten, to hold to the heirs and assigns of the said Margaret. Margaret had a son at the testator's death. Richard died leaving a son, living Margaret, and the contest was between the heir of Richard and the children of Margaret, who claimed to take under the appellation of heirs of Margaret. In that case, De Grey, C. J., said "the intention of the testator is clear, that the same favor should be extended to the heirs of Margaret as to the heirs male of Richard. He took notice that his daughter was living, by leaving her a term and a subsequent annuity; and he meant a present interest should vest in her heir; that is, her heir apparent during her life."

Blackstone thought that the testator's varying the tenure of Margaret's annuity from that of the other sisters, by making hers dependent on the joint lives of herself and Richard, was proof that the testator had calculated Margaret might survive Richard, and therefore, as on Richard's death, the estate was to go to his heirs male and the heirs of Margaret, and at a time when the testator calculated Margaret might be living, the word "heirs" must be understood issue.

These cases need only be stated to show their want of application to the one now under consideration. Was any present vested estate devised to the heirs of Mrs. Stith, which they were to take on the death of the testator, though the enjoyment was deferred? To make the most of their case, it was only an executory devise of the fee-simple, after the previous fee to the children of George. During the life-time of George nothing ever passed to the heirs of Mrs. Stith, nor was it intended by

the testator. If George should have children, the estate became vested in them, without a possibility on the part of the plaintiffs. From no part of the will is it to be collected that it was the intention of the testator, the heirs of Mrs. Stith should take the estate, though she might be alive. Nor can we ascertain, like the case in *Pr. Williams*, that upon the death of George, without children, the estate was not to go over until a failure of Mrs. Stith's issue. What influence, then, can the facts found have in expounding the intention of the testator? Can it be inferred from any part of the will that the testator had calculated that Mrs. Stith might be alive when her heirs were to take? In short, does it appear that the intention of the testator will be frustrated by understanding him to have intended what he has said? It does not. And it is not in the power of human ingenuity to discover, from reading over the will and the facts found, that the testator did not mean the heirs of Mrs. Stith, namely, those who should succeed to her real estate after her death were those intended to be benefited by the devise. There is no ground to make such inference from the situation of the parties, as in any event the devise to the heirs of Mrs. Stith was never to vest till George's death, without having issue, and by George having children, to be effectually prevented. The testator, therefore, might have calculated upon George's surviving his sister Stith.

In whatever way, therefore, I am capable of considering this question, it seems to me there is no ground to doubt. Mr. Powell, in his excellent *Treatise on Devises*, page 567, says: "It is necessary to the constitution of a devise that there be a devisee, certain, or capable of being made, etc., and the law, therefore, requires every one claiming in that character to answer in all respects to the description the deviser has given." And in page 869, upon the same subject, he continues: "Whenever a testator describes his devisee, as heir of one generally, none can take under that description unless he fully answers it in all particulars; from whence it follows that none can take, as such, during the life of his ancestor, for '*nemo est haeres viventis*.'" The author then, by way of illustration, puts the case: "One having two sons and two daughters, devised his lands to his youngest son, in tail, and for want of such issue to the heirs of the body of his eldest son, and if he died without issue that the land should remain to his two daughters, in fee. The testator died; the youngest son died without issue, leaving the eldest, who had issue, and it was held by the whole court he

could not take." But the same author, after citing divers other cases, decided upon the same principle, remarks: "But if the testator clearly show, by positive words, or if it must be necessarily inferred from facts, that he meant one to take by the description of a particular heir, who was not general heir, that intent shall be carried into execution." Under which description the cases from Pr. Williams and Blackstone are noticed.

Independently, therefore, of the conviction of my own understanding, the opinion I entertain is supported, as I conceive, by all the adjudged cases and elementary writers I have had an opportunity to examine.

Wherefore, I am of opinion there should be judgment for the defendant.

TAYLOR, C. J., I would willingly avail myself of any expressions in the will manifesting the testator's intent to use the word "heirs" in a different sense from that affixed to it by the law. So far the authorities allow us to go; but in all the cases cited for the plaintiff, and none more in point can be found, such intent was collected from the will itself. Parol evidence has never been resorted to; it was offered in the case in Leonard, 70, but rejected by the court.

HALL and HENDERSON, JJ., gave no opinion.

Judgment for the defendant.

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## STATE v. YANCOY.

[1 CAR. LAW REPOS. 519.]

**AUTREFOIS CONVICT.**—A person may be indicted for an assault committed in view of the court, though previously fined for the contempt, the same act constituting two offenses, one against the court and the other against the public peace, and therefore the plea of *autrefois convict* is not available.

**INDICTMENT** for assault and battery. Plea, *autrefois convict*. The jury found specially that the defendant, for the assault wherewith he was charged, had been brought into the county court of Wake, and, on his submission, fined for a contempt, the assault having been committed in view of the court. The question was whether, under these facts, the plea formed a bar to the indictment.

Burton, Attorney-general, for the state, cited 9 Johns. 417.

Browne, for the defendant, cited 4 Bl. Com. 121; Cro. Eliz. 405; 1 Bl. Rep. 640.

TAYLOR, C. J. The punishment for the contempt is not a bar to this prosecution. The first was in the exercise of a power incident to all courts of record, and essential to the administration of the laws. The punishment in such cases must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. The indictment for the assault leads to the correction of the party for the disturbance of the public peace. Although but one injury is done to the individual assaulted, yet the same act constitutes two public offenses, which, according to the circumstances, might require different degrees of punishment. The court may punish, in a summary way, its officers abusing its process by oppressing the parties, or committing extortion, fraud or malpractice; yet none of these offenses are merged in the contempt. If parties concerned in a cause are libeled, this amounts to a contempt of the court, and may be punished in a summary way; but may not the offender also be indicted? The same consequence would seem to follow in cases of rescue, where the party might be punished both for the contempt and the misdemeanor. One offense violates the law which protects courts of justice, and stamps an efficient character on their proceedings; the other is leveled against the general law, which maintains the public order and tranquillity.

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The doctrine of this case is noticed by Bishop, 2 Cr. L., sec. 264, who says: "Many acts are both contempts of court and indictable crimes. Others while analogous to contempts in their nature and tendencies, are indictable, but no more. And as we saw in the preceding volume how the same thing may be equally a civil and a criminal injury, for which a civil suit and a criminal prosecution may both be maintained; so here, the indictment and the proceeding for contempt are entirely distinct, and neither will be a bar to the other." The case is cited and approved in *State v. Woodfin*, 5 Ired. 199, where its doctrine is followed.

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## CARSON v. NOBLET.

[1 CAR. LAW REPOS. 522.]

**POSSESSION TO MAINTAIN TRESPASS.**—The owner of a chattel may maintain trespass for it, if, at the time of the injury, he have the right of present possession though the actual possession be in another.

**ACTION of trespass *vi et armis*** against a constable for seizing and selling a horse belonging to the plaintiff while in the possession of a third person, upon an execution against such person. The following facts were found by special verdict: The horse which was the subject of the action, was left by the plaintiff in

the care of his father, with permission to use him until such time as he should send for him. While so in the possession of the father the horse was borrowed by one Roston and was afterwards seized and sold by the defendant, a constable, upon an execution against Roston. The question was whether, under these circumstances, the plaintiff could maintain the action.

By Court, TAYLOR, C. J. It seems to be well settled, that either an actual or a constructive possession will entitle a person to bring trespass. Where he has the right of present possession, though the actual possession may not be in him, it is sufficient; and although the actual possession be in another, under such circumstances as enable the owner to determine it when he please, by retaking the property, yet he is not precluded from bringing this action. The father of the plaintiff had the possession, as the depositary of the plaintiff, but there was, also, an implied possession in the latter, as there is in an owner who employs a carrier. In the case of *Ward v. Macauley*, 4 T. R. 489, the owner had parted with the right of possession to the furniture, during the continuance of the lease, and therefore he could not maintain trespass. Lord Kenyon, there, thought he might bring trover, in respect of the right being in him; but he afterwards retracted that opinion, and in *Gordon v. Harper*, 7 T. R. 9, it was held, that in such a case, even trover would not lie. In this case, the plaintiff allowed his father to use the horse, until he thought proper to take him, and whether the horse was taken from the father or from Roston, makes no difference, since a sufficient possession remained in the plaintiff, for the protection of his property.

Judgment for the plaintiff.

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## GOLDEN v. LEVY.

[1 CAR. LAW REPOS. 527.]

**OWNER'S RIGHT AS AGAINST FACTOR.**—A sale by a factor creates a contract between the owner and the purchaser, and payment may be made to the owner against the orders of the factor. Accordingly, when the captain of a stranded vessel employed auctioneers to sell the cargo saved, which they did, and contrary to his directions, paid the proceeds to the owners, reserving the amount due the captain for freight, such payment was held good.

**ACTION** by the master of a stranded vessel against auctioneers to recover proceeds of sales of cargo. The plaintiff, being the

master and owner of a vessel stranded during a voyage, employed the defendants as auctioneers to sell the cargo. The defendants having made the sales accordingly, paid over the amount to the owners, in violation of the captain's orders, reserving a sum sufficient to cover the freight which is admitted to be due and ready to be paid to the plaintiff. There was a verdict for the amount admitted to be due, and the case was sent to this court to be heard upon an application for a new trial. The question was as to the validity of the payment made to the owners by the defendants.

By Court, CAMERON, J. It is a well established rule of law, that a sale by a factor creates a contract between the owner and the purchaser; if, however, the purchaser pay the factor for the goods so sold, such payment will protect the purchaser from the demand of the owner, unless the latter had forbidden the former to pay the factor. But where the purchaser pays the owner, in opposition to the wishes and against the order of the factor, such payment will be good; because the owner, being, through the agency of the factor, a party to the contract; and being, moreover, the beneficial proprietor of the goods sold, has an unquestionable right to receive payment directly from the purchaser.

The defendants in this case being public auctioneers, does not vary the principle on which it depends; their employment to sell the goods proceeded, in fact, from the owners, whose agent, for that purpose, the plaintiff certainly was. And had they refused to account with and pay over to the owners the amount of sales, the latter might have recovered such amount, deducting what might be due the plaintiff for freight.

It is conceded that the plaintiff had a lien on the goods delivered by him, as agent for the owners, to the defendants, to the amount of the freight due him from the owners, but this lien on a part, cannot entitle him to the possession of the whole amount of sales, against the will of the absolute proprietors.

The defendants, having received the goods from the plaintiff, as the agent of the owners, and having in the ordinary course of business, disposed of them, are called on by the plaintiff to account for the sales; they say, we have paid to the owners of the goods the amount of sales, reserving for you the amount due you for freight, which we are ready to pay you. This, in justice, is all the plaintiff can ask, and as this is secured to him by the verdict of the jury, we are of opinion it should stand.

Rule for new trial discharged.

## GATLIN v. KILPATRICK.

[1 CAR. LAW REPOS. 534.]

**OMISSION TO PLEAD AT LAW.**—A party having a defense at law and neglecting to avail himself of it cannot have relief in equity.

**RELIEF AGAINST VERDICT.**—Relief cannot be given against a verdict as being contrary to equity unless the plaintiff knew the fact to be different from what the jury have found it and the defendant was not aware of it at the time of trial; or where there was no jurisdiction at law; or where the verdict is obtained by fraud.

**PAROL EVIDENCE INADMISSIBLE.**—Parol evidence is not admissible to show that the condition upon which the price of a house was to be paid was different from the purport of the note given for the price.

**EQUITY.** Bill to enjoin action at law. Appeal from judgment dismissing the bill for want of equity. The bill stated in substance that in February, 1806, the complainant purchased from the defendant a stud horse for one hundred and fifty pounds payable the ensuing Christmas, but that in case the horse died before the end of the season no part of the price was to be paid, and that a note was drawn expressing this condition; that the defendant refused to receive the note, because the condition rendered it non-negotiable, but agreed, nevertheless, to abide by the condition, and that complainant thereupon gave an unconditional note; that the horse died before the end of the season; that defendant brought suit on the note, which the complainant employed and instructed counsel to defend; that he summoned witnesses who failed to attend, and was also absent himself through severe illness. The question was whether the facts stated entitled the complainant to equitable relief.

By Court, TAYLOR, C. J. If the complainant could have made any defense to the suit brought on the note, it was strictly of a legal nature, which he had an opportunity of showing upon trial. If injustice had been done to him on that occasion, his remedy was still in a court of law, by applying for an appeal or *certiorari*. The circumstance of his not having availed himself of these remedies, will not give this court a jurisdiction which it did not before possess. There ought to be some period to litigation; and where could it be more properly terminated than the principle of law has already directed: that where a man's claims have been decided on, by a court of competent jurisdiction, or where the opportunity was afforded him of having them decided on, he shall no longer be at liberty to harass his adversary? The court cannot relieve against a verdict at law for be-

ing contrary to equity, unless the plaintiff knew the fact to be different from what the jury have found it, and the defendant was ignorant of it at the time of trial; as where the plaintiff sued for a debt, and the defendant, after verdict, discovers a receipt for the demand: 3 Atk. 224; or where effectual cognizance cannot be taken at law, as in complicated accounts, or where a verdict is obtained by fraud; and not where the party omitted to avail himself of his legal defense: 1 Schoale and Lefroy, 205. On this principle alone the bill ought to be dismissed; but even if the defendant had made his defense at law, the event must have been equally unfavorable to him, because he could not have been allowed to prove by parol that the contract was different from the purport of the note. It is not alleged in the bill, that the condition on which the price of the horse was to be remitted, was suppressed by fraud, or omitted through mistake. The simple charge is, that the parties both agreed not to insert the condition, in the note, but trust it to the memory of witnesses.

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### STATE v. TREXLER.

[2 CAP. LAW REPOS. 90.]

**ROBBERY—DISTINCT ASPORTATIONS.**—Where there is one continuing transaction, though there may be several distinct asportations, the party may be indicted for the final carrying away.

**FORCIBLE TAKING.**—Snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery.

**SAME.**—Where the prosecutor in the presence of the prisoner accidentally dropped a bank note, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued for the possession of it which resulted in the prisoner's keeping it and carrying it away, it was held that it was a forcible trespass, the note not being the subject of larceny.

**INDICTMENT** for a trespass in taking from the prosecutor a bank note of one hundred dollars. There was a verdict of guilty, and a motion for a new trial, and it was agreed that the court should decide whether the facts alleged in an affidavit made by the prosecutor constituted an indictable trespass or not, and award or refuse a new trial accordingly. The material facts stated in the affidavit were as follows: On the fifth day of June, 1809, the prosecutor being at the house of the prisoner, took out his pocket-book to exhibit certain papers, and in so doing accidentally dropped the bank note in question. The prisoner

stealthily picked up the note, and the prosecutor observing the action attempted to take it from him, when the prisoner clenched his hand upon it and refused to give it up. A scuffle then ensued between the prosecutor and the prisoner for the possession of the note, which resulted in the prisoner's keeping it and running out of the room with it, after which time the prosecutor never saw it again.

By Court, SEAWELL, J. It has been argued by the prisoner's counsel, that an indictment for a trespass will not lie, on the facts set forth in this case—owing, as it is alleged, to the want of an actual breach of the peace—the bank note being taken from the pocket-book privily, whilst the prosecutor was collecting the papers which had fallen, and that if any offense was committed, it was larceny; and even if the court should be of opinion actual force was employed, yet it would then be robbery, and in both instances the trespass be merged in the felony. As to the latter argument, we find no difficulty in disposing of it. The bank note not being a subject of larceny, no felony could be committed to extinguish the trespass. And as to the first, we all agree that if the prosecutor, upon discovering the note in prisoner's hands, had only demanded it, and the transaction had there broken up, the refusal to deliver, and the subsequent detention, could not have, nor does it have, any influence upon the case, so as to make the first taking forcible; for though it is true the prisoner had then committed a complete felony (supposing the note a proper subject), yet as the transaction did not then break up, but was continued by the prosecutor at the same instant seizing the prisoner, who then had the note, which continued in sight and which had never been out of reach, it was to every substantial purpose reduced to possession; and the prosecutor being then overcome by the prisoner in the scuffle, the carrying off the note constituted the actual asportation; for where there is one continuing transaction, though there be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or intermediate acts. The case of *King v. Dyer and Dister*, which is cited 2 East, 767, was, where Dyer, the master of a boat, was employed to bring on shore a quantity of barilla, and Dister and others were employed as laborers to remove the barilla, after it was landed, to Hawkin's warehouse; that while the barilla was in the boat, some part of it was separated from the rest and concealed in another part of the boat, without the privity of Dyer;

that afterwards Dyer and Dister and the others, who had removed and concealed it, carried it off, and though a complete legal taking and carrying away was performed before Dyer had any agency or knowledge, yet as he joined in the final actual asportation, he was held guilty and convicted. To the same effect is the case of *The King v. Atwell*, cited in the same book. Suppose a thief should privately take money from one pocket and place it in another, for the convenience of handing it at a suitable time to his comrade, and when he attempted to take it out again, the owner should seize his hand, upon which a scuffle takes place, and the owner is overpowered or awed to desist, and the thief goes off with the money? This, surely, would be robbery. In the present case, the prisoner being seized before the note was even out of the prosecutor's presence, and being then in reach, was as much in his possession as the pocket book he had laid down. Had the prosecutor caught hold of the bill and then been overcome or intimidated, it would have been robbery; and if an actual touching of the note be essential to the regaining possession (which I, for my own part, by no means think necessary), the jury had ample room to presume it from the circumstances, and should have been so instructed. The snatching anything unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done the person, as in *Lapier's case* of the tearing the ear, the taking is a robbery. Buller, J., in *Rex v. Horner*, cited in *Leach*, in note to *Baker's case*. This distinction steers clear of the cases cited in *Hawkins* and *Hale* of a stealing of the purse privily, and upon the owner's discovering it in the hands of the thief, demanding it when the thief threatened to pull his house from over his head if he said anything about it, and rode off, which was held to be no robbery. It is also to be remarked that at that period the prevailing opinion seemed to be that a taking to constitute robbery must be through fear.

Wherefore we are all of opinion the jury did right in finding the prisoner guilty; that it was a rank trespass, and the rule for a new trial should be discharged. It would be a reproach to the law to consider the taking a hat which a frightened man had let fall accidentally from his head, a robbery, the lifting of a sash, a breaking of a house, so as in both instances to constitute capital offenses, and not to consider the present a taking by violence, when the final carrying away was by the dint of strength.

## WILLIAMS v. LANE.

[2 CAL. LAW REPOS, 266.]

**ERROR IN A WILL IN DESCRIBING QUANTITY OF LAND.**—Where a testator devised “to his grandson A. L. three hundred and fifty acres of land, being the upper part of a tract of seven hundred acres; and to his granddaughters P. L. and J. L. the lower part of the same tract, to be equally divided between them,” and the tract was found to contain in fact eleven hundred acres, it was held that the grandson was entitled to only three hundred and fifty acres, and the granddaughters to three hundred and seventy-five acres each.

**OMISSION OF WORDS “MORE OR LESS,” IMMATERIAL.**—Describing a tract of land as containing a specific number of acres is the same as the description of a tract containing so many acres, more or less.

**PETITION** for the division of a tract of land devised to the parties in certain proportions. The facts are stated in the opinion.

By Court, CAMERON, J. In this case the testator, Theophilus Hunter, devised as follows: “I give and bequeath to my grandchildren, by my daughter Jane, as follows, to wit:—To my grandson, Alfred Lane, three hundred and fifty acres of land, being the upper part of a tract of land of seven hundred acres, purchased by me of Jas. Lane, lying on Crabtree Creek. Also, to my granddaughters, Patsey Lane and Jane Lane, I give and bequeath the lower part of the same tract of land, to be equally divided between them.”

The tract contains, by actual survey, one thousand one hundred acres of land, and the question is, whether the defendant is entitled to three hundred and fifty acres, being the upper part of the tract, or to one half of the tract?

The meaning of the testator is always to prevail, when it can be fairly inferred from the words he has used, and when it does not contravene any known or established rule of law. It does not follow, because the testator describes the tract in question as a tract of seven hundred acres, and devises to the defendant three hundred and fifty acres, being the upper part of the same, that he intended to give him one half of the tract. Suppose the tract only contained five hundred acres, could the court say that the testator only intended that the defendant should have two hundred and fifty acres, when he has expressly and specifically devised to him three hundred and fifty acres? We apprehend not.

It was decided in the case of *Powel v. Liles*, in this court, that

describing a tract of land, as containing a specific number of acres, did not vary the case from a description of a tract by so many acres, more or less. If the testator had described the tract to be seven hundred acres, more or less, no question could have been raised. In our opinion, the words he has used mean nothing more than if he said seven hundred acres, more or less. Wherefore, a majority of the court are of opinion that the defendant, Alfred Lane, is entitled, under the will of the said Theophilus Hunter, to three hundred and fifty acres of land, to be taken from the upper part of the aforesaid tract, and that the petitioners are entitled to have the residue of said land divided between them equally.

TAYLOR, C. J., and SEAWELL, J., dissented.

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### BULLOCK v. TINNEN.

[2 CAR. LAW REPOS. 271.]

**GIFT—WHAT NECESSARY TO CONSTITUTE.**—Delivery is essential to complete the gift of a chattel, except where it is granted by deed, or is incapable of manual delivery. Accordingly, where a father, the day after the death of his son, relinquished to his son's widow all the right which he had to a distributive share of his son's estate, but without deed or delivery, and in the absence of the widow, it was held that the father might still recover such distributive share.

**BILL** by Micajah Bullock against Nancy Bullock (who afterwards intermarried with one Tinnen) charged that her husband Philip died intestate, she being the administratrix, and in that character having possession of certain property claimed by the complainant as next of kin, particularly a negro and her children. The answer of the defendant admitted that her husband died intestate, admitted the possession of the negroes, but alleged that the said Micajah, did fully, freely, and absolutely release to the defendant all his right and interest to any part of his said son's estate, by reason of his having died intestate.

An issue being made, the jury found, that the complainant did yield and relinquish to the defendant, a certain negro and her children, for the consideration of love and affection; and the relinquishment was made by parol, the said Nancy not being present at the time.

Motion to dismiss the bill.

*Brown and Norwood, for complainant.*

*Nash*, for defendant.

By Court, TAYLOR, C. J. Whatever wishes the circumstances of this case may be fitted to inspire, the court are not apprised of any authority or principle of law, by which the transaction between Bullock and his daughter-in-law can be supported.

The delivery of possession has ever been deemed necessary to complete the gift of chattels, except they are granted by deed, or are incapable of being delivered. "Every thing that is not given by delivery of hands, must be passed by deed. The right of a thing, real or personal, may not be given in nor released by word:" *Noy, maxim. 33.* If the gift does not take effect, by the delivery of immediate possession, it is then not a gift but a contract, the performance of which can only be compelled upon good and valuable consideration: 2 Bl. 442. It has even been held that if a man, without consideration, deliver a thing to another to be given to a third person, he may countermand it at any time before delivery over: *Dyer, 49.*

The rule of the civil law appears to have been less strict, with respect to gifts, than the common law; but though it did not require a delivery, the presence of the party, to whom the gift was made, was deemed essential. It substituted, besides, other ceremonies, which were perhaps as well calculated to make the transaction public, and to guard against haste and imposition, as those required by our law. It is the object of all laws to enforce the performance of those contracts and engagements which grow out of the relations and state of society; and the ceremonies requisite to their validity are designed to fix and ascertain the intention of parties, and the degree in which they mean to incur a legal responsibility. No man, who deliberately makes a promise, can in morality or honor, recede from the performance of it, without very sufficient reason; but the law lends its aid in compelling the performance of those engagements only, which are contracted under prescribed ceremonies, and evidenced by certain proofs of deliberation. A man may have a present intention to do a thing, or may intend to do it in future, and express himself to that effect, without meaning at the time, to lay himself under a legal obligation. And it may well be doubted whether it would be wise, if it were practicable, to give legal effect to those promises which are made without due deliberation, or under the influence of some strong emotion, the presence of which, in a greater or less degree, interrupts the calm decisions of the judgment; whether the heart abandon

itself to the transports of joy, or is weakened by the sympathy of grief, something is deducted from the prudence and circumspection which the mind exercises in the ordinary concerns of life.

The court overruled the motion to dismiss the bill.

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## SQUIRES v. RIGGS.

[2 CAR. LAW REPOS. 274.]

**PRIOR VOLUNTARY CONVEYANCE, WHEN VALID.**—A prior voluntary conveyance of land shall prevail against that of a subsequent purchaser, unless the latter is fair and honest. Hence where A., in consideration of blood and affection, conveyed his lands to his son, and afterwards for a valuable consideration sold the same land to B., with the intention of defrauding his creditors, it was held that the son was entitled to recover from one who purchased of B. with notice of the facts.

**EJECTMENT.** Motion for a new trial after a verdict for the plaintiff. The facts were: R. Squires, in consideration of blood and affection, conveyed the land in controversy to his son, the plaintiff's lessor. Subsequently, R. Squires conveyed the same land to one Jones, for a valuable consideration, but with intent to defraud his creditors. Jones, for a valuable consideration, conveyed to Riggs, who had notice of the fraud, and under whom the defendant held. The question was as to whether, upon these facts, the verdict was right.

*Donnell*, for the plaintiff.

*Gaston*, for the defendant.

By Court, TAYLOR, C. J. The statutes relative to fraudulent conveyances have, from the periods of their enactment, received that construction which appeared most likely to suppress deceitful practices, and to obviate all temptation to commit them. And the principle arising in this case, was brought under the notice of a court of a very early period after the passing of 27 Eliz., when such a decision was made as might have been expected from the spirit and policy of the statute; for it would seem strange that a person setting up a title, which bore upon its face the character of iniquity, and was avowedly designed to defraud creditors, should shelter himself under a law, the very design of which was to frustrate and discountenance all such attempts. Accordingly it has been held in every case in which the question has occurred, not only that a purchaser must have

paid a valuable consideration, but that the transaction must be fair and honest; and although it is not possible, perhaps, to find a case where the purchase was made precisely with the same view, viz., to defraud the creditors, as in the case before us, yet the *bona fides* is required as indispensable; for it surely cannot make any difference in principle whether the transaction, if it be really corrupt, receive its impurity from one source or another. There is a case cited in *Twynes' case*, 3 Co., which lays down the law in very explicit language. A person having made a voluntary conveyance of his lands, afterwards being seduced by deceitful, covinous persons, for a small sum of money, bargained and sold his land, being of a great value. This bargain, though it was for money, was holden out of the statute, which being made against fraud, does not help a purchaser who does not come to the land for a good consideration, lawful, and without fraud and deceit. Though this case does not involve the rights of creditors, yet it may fairly be considered a direct authority for the principle that a prior voluntary conveyance shall not give way to a subsequent purchaser who has conducted himself dishonestly. It is, in effect, giving to the word purchaser, under the statute, the same meaning which is affixed to it in the courts of equity, as one who innocently and without fraud or surprise, for valuable consideration, acquires a right or interest. The cases in Cro. Eliz. 445, and 1 Bur. 396, are to the same effect. In the last case that is recollected, where the same question has occurred, the language of the court is particularly strong. The amount of it is, that a purchaser is not entitled to the protection of the statute unless the transaction is *bona fide*, and the purchase fair in the understanding of mankind. It is not necessary that it should be for money, but it must be fair; if it is colorable only it cannot stand: Cowp. 705.

Upon the whole, we think the plaintiff entitled to judgment upon the reason of the thing, the policy of all the statutes and acts concerning fraud, and the unvarying exposition they have received in respect to the point of this case.

Judgment for the plaintiff.

## CAMERON v. MCFARLAND.

[2 CAR. LAW REPOS. 415.]

**VOID CONTRACT—ILLEGAL CONSIDERATION.**—A bond, part of the consideration of which is an agreement not to prosecute for malicious mischief, is void as against public policy.

**ACTION on a bond.** The question was whether an agreement not to prosecute for malicious mischief forming part of the consideration of a bond will vitiate it.

*McMillan*, for the defendant, cited Comyn on Contracts, 84.

By Court, TAYLOR, C. J. We do not require the authority of an adjudged case, to enable us to pronounce clearly and unequivocally that this bond is void. The principle of our decision is incorporated in the common law, which does not sanction any obligation founded upon a consideration which contravenes its general policy. This impresses upon the transaction an inherent defect, which cannot be removed by the most deliberate consent of the parties, or the utmost solemnity of external form.

Were it otherwise, there is no law, however important to the public welfare and happiness, which might not be paralyzed by the private agreement of individuals; and it would seem extravagantly absurd, that the law might be called upon to enforce a contract whose essence and vitality are founded upon the violation of law. For all laws might be overthrown, if men could enter into covenants not to obey them; and if courts of justice recognized the validity of such engagements, the law would be accessory to its own destruction. The consent of parties alone to a contract does not impart to it obligatory force; it is also necessary that the subject of it be such as they have a rightful power to contract about. He who receives a vicious bond, does by that very act relinquish all claim to the favor of the law, inasmuch as he does, as far as he can, give another an unjust and unlawful power over him.

This principle is very fully illustrated in *Collins v. Blantin*, 2 Wils. 347, where the defendant and others being indicted by one Rudge, the plaintiff gave his note to Rudge, to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. Rudge did not prosecute; and the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who, having pleaded the consideration, it was resolved, that the note being given for an illegal purpose, viz., the compounding the prosecution, and

the bond given to secure and repay that, that the bond was illegal and void. In many subsequent cases, the same doctrine has been enforced, and they all establish, that every transaction, the object of which is a violation of a public duty, is void, such as bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured, agreements to stifle prosecutions of a public nature. All these considerations have been respectively brought into judgment, and pronounced illegal. And wherever it is attempted, by a contract, to prevent the due course of justice, the law gives no remedy upon it. As if a man promise money to another, in consideration that he will not give evidence in a cause; such promise cannot be enforced, on account of the illegality and iniquity of suppressing testimony in any cause.

Judgment for the defendant.

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### STATE v. COMMISSIONERS.

[2 CAR. LAW REPOS. 617.]

**MUNICIPAL OFFICERS INDICTABLE FOR NEGLIGENCE.**—Town commissioners, who are invested with power to levy taxes to keep the streets in order, are liable to indictment for culpable omission and neglect to repair the streets.

INDICTMENT against the commissioners of Fayetteville, for not repairing the streets of the town. The case was heard upon demurrer to the indictment.

*Gaston*, for the defendants, cited *Crown's Circ. Companion* 307; 1 *Hawk.* 368; Acts 1786, c. 18, sec. 4; 1715, c. 36, 2 1784, c. 14; 1786, c. 18; Private Acts, 205; 2 *Hayw.* 228; 1 *Id.* 243.

*McMillan*, for the state, cited Private Acts 1783, c. 25, sec. 7; *Crown's Circ. Companion*, 548; *Doug.* 797; 2 *Coke's Inst.* 701.

By Court, DANIEL, J. It is referred to the supreme court to decide upon consideration, of the public law, and of the private acts which have been passed to regulate the town of Fayetteville (which private acts are a part of this case) whether the persons who hold the office of commissioners are liable to an indictment upon the ground that the streets are out of repair.

We are of opinion the defendants are subject to an indictment, if the streets of the town are permitted to be and remain

out of repair. Annoyances in highways by rendering the same inconvenient or dangerous to pass, either positively by actual obstructions, or negatively, by want of reparations, are deemed nuisances. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse the same, may be indicted.

Let us examine who are bound to repair and cleanse the streets of the town of Fayetteville. By an act of the general assembly passed in the year 1787, the commissioners are invested with full power and authority to make rules and regulations, and to pass ordinances, for levying and collecting taxes on the persons and property in said town; and they are directed and empowered to appropriate the money which they shall cause so to be collected to various objects for the good government and well-being of said town; one of which objects, as expressly declared by the act, is the reparation and keeping in good order the streets of said town. It is not denied, that the keeping the streets in repair is a thing that concerns the public in general. If the commissioners are guilty of omission, in laying the taxes, and appropriating some part of the proceeds, in repairing the streets, I would ask if they have not completely omitted to perform an essential duty, imposed upon them by law, which duty was of public concern? The law says, that where a statute commands or prohibits a thing of public concern, the persons guilty of disobedience to the statute are liable to be indicted for the disobedience. The commissioners, instead of calling out the hands to work on the streets, like an overseer of the public roads, call forth the pecuniary resources of the town, and hire laborers to perform the duty, etc. It has been said that as the commissioners are annually elected, it might so happen that one set of commissioners might be punished for the omissions of their predecessors in laying the taxes, etc. The defendants are charged in the indictment with their own culpable omission and negligence, and not with the faults of others; and unless this principal charge in the indictment be substantiated, they cannot be convicted. The law requires an impossibility of no man.

The demurrer is overruled.

LOWRIE, J. I doubt

CASES  
IN THE  
CONSTITUTIONAL COURT OF APPEALS  
OF  
SOUTH CAROLINA.

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KIDDELL *v.* FORD.

[§ BREVARD, 178.]

**INSOLVENCY EXCUSING NOTICE.**—The reputed insolvency of the drawer will not necessarily excuse demand and notice. The insolvency which may excuse want of notice or which may be equivalent to notice, must be such an absolute and notorious insolvency as leaves no doubt of the fact.

**MOTION** for a new trial in an action by Kiddell, the indorsee, against Ford, the indorser of a promissory note, made by one Taylor, in favor of defendant. The note was due April 1, 1805. A witness testified that in June, 1805, Kiddell showed to him a letter received from Taylor, in which he expressed regret at his then inability to pay, and requested further indulgence for sixty days, which Kiddell granted; that witness told Ford of this letter, and said that he, Ford, ought to pay the money, to which Ford replied that he would have done so had Kiddell used diligence to get the money from Taylor. There was no evidence that Kiddell had demanded payment of Taylor within a reasonable time, or had given notice to Ford. It did appear that subsequently, in 1807, Kiddell recovered a judgment against Taylor, on which he had execution issued, and levied on land belonging to Taylor, but the sale was prevented by Kiddell's attorney, on the ground that the land was under mortgage to certain parties, who were willing to give indulgence. Taylor was generally believed to be insolvent.

Verdict for the plaintiff.

*Richardson*, in support of the motion for new trial.

*Simons*, *contra*.

COLCOCK, J.\* It does not appear that there was sufficient evidence of a demand on the maker of the note, and notice of non-payment to the indorser, within any time, or if any, within a reasonable time. Notice ought to be sufficient, although it need not be formal. Besides, there was evidence of indulgence given by the indorsee, which seems sufficient to exonerate the indorser. The evidence of insolvency was not complete, even if the insolvency of the maker can be considered as sufficient reason to excuse want of notice. The motion ought to be granted.

BREVARD, J. In order to fix an indorser, it is necessary in general that the holder should demand or use due diligence to obtain payment of the maker as soon as the note becomes payable; and on default of payment, should use due diligence in giving notice thereof to the indorser, and of his intention to have recourse to him. It is also usual to state in the declaration a demand on the maker, his refusal to pay, and notice to the indorser; but there may be circumstances which will excuse actual presentment and notice, or which may be considered equivalent thereto.

It has been decided in our courts that the payee of a note, indorsing it, knowing the insolvency of the maker, cannot insist on notice. In England, it has been ruled otherwise, and that a known bankruptcy is not equivalent to a demand or notice: 2 H. Bl. 609. It is the general understanding of the parties, when negotiable paper is indorsed, that the legal consequences shall attach, and that an indorser is entitled to all the privileges of that character. The necessity of a demand, notwithstanding the bankruptcy of the maker or acceptor, in order to charge the indorser or drawer, is founded solely on the custom of merchants, it is said, and that the courts cannot change the custom: 8 East, 242.

In this state, however, the rule has been relaxed, and it has been determined that a known bankruptcy shall be equivalent to a demand and notice. The case of *Clark v. Administratrix of Minton*, which was decided in the constitutional court of appeals at Columbia, in April, 1807, 2 Brevard, 185, established that distinction. The case was tried before myself in the court of common pleas for Kershaw district; the action was against the indorser's administratrix, upon a note made by Douglass, pay-

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\*The court at this time was composed of Grimke, Bay, Brevard, Smith, Nott and Colcock, JJ., the latter taking the place of Waties, J., who was appointed to the court of chancery.

able the first of April, 1802, bearing date September, 1800. It did not appear when it was indorsed, in fact, otherwise than by the indorsement itself, which was dated September, 1800; the declaration was in the usual form. It appeared in evidence that Douglass, the maker, became insolvent, and was declared a bankrupt, the ninth of November, 1801; that he left the state in a vessel bound to Liverpool, in February, 1802, and that he landed in Jamaica, where he afterwards remained; also, that he was reputed and generally believed to be insolvent from the time of going from the state. No evidence was given of demand, or due diligence to get payment from the maker, nor any notice to the indorser of the indorsee's intention of resorting to him; a motion for a nonsuit was overruled, and the plaintiff had a verdict. I held that, under the circumstances of the case, it was not incumbent on the plaintiff to prove any demand of, or diligence to obtain payment. It was not pretended that the evidence to excuse the want of notice could be rebutted.

After hearing arguments for a new trial, the whole court, Grimke, Waties, Bay, Trezevant and Wilds, JJ., confirmed the law, as laid down by the district court; and Judge Waties, in delivering the resolution of the court, said that the strict rule of the English law had been often departed from, and particularly in the case of *Kiddell v. Perroneau*, which had been decided in Charleston many years before; he further declared that a known bankruptcy or insolvency was equivalent to demand and notice, and that no good reason could be assigned to the contrary. I am not disposed, however, at present to carry the doctrine further than was done in the case of *Clark v. Minton's Administratrix*. There was no proof of bankruptcy in this case, nor of an absolute declared insolvency, under the insolvent debtor's or prison-bound's acts.

It has been said that Taylor's insolvency was known to Ford at the time the note was indorsed, and that he acknowledged it; but I am not satisfied that such an insolvency was understood as would be equivalent to a declared bankruptcy, or insolvency of record; it ought to be an utter insolvency at the time the money becomes payable to excuse the want of ordinary diligence. In the present case there was no sufficient evidence of such insolvency; there was no sufficient evidence of due diligence to demand payment of the maker of the note, or of notice to the indorser to satisfy me that the plaintiff was entitled to the verdict he has obtained. Besides I am not certain that the indorsee did not give credit to the maker, and allow him

further time for payment. If he did so, the indorser is absolved from all responsibility. I think the circumstances of the case are strong to warrant that presumption. If I were sure that the jury decided this point in favor of the plaintiff upon a fair and full consideration of the evidence, I should not venture upon this ground to set aside the verdict; but I incline to think it might have been overlooked, attending to other points which were brought more strikingly to their notice.

I do not feel myself at liberty to presume fraud on the part of the indorser. The circumstances of the case do not authorize the belief of fraud which ought to be sufficiently proved, and ought never to be presumed. He might have known of Taylor's general want of means to pay his debts, without knowing that he was utterly insolvent; many men are deemed insolvent on account of their involved circumstances and want of active funds, who are nevertheless far from a state of legal insolvency; and this might have been Taylor's case when the note in question was indorsed, for anything that appears to the contrary from the evidence reported. Upon the whole I am of opinion that the defendant ought to have another opportunity of contesting the justice of the plaintiff's demand, and the legal propriety of the verdict in question.

GERMKE, J., was of the same opinion.

NOTT and BAY, JJ., dissented.

New trial granted.

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In a note to *Bond v. Farnham*, 4 Am. Dec. 47, this subject is examined, and it is there shown that insolvency does not excuse demand and notice; and this is further shown by the cases of *Crosen v. Hutchinson*, ante, 55; and *Sandford v. Dillaway*, ante, 99.

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## CHARDON v. OLIPHANT.

[3 BREVARD, 183.]

POWER OF PARTNER AFTER DISSOLUTION.—After the dissolution of a partnership, the admission of a debt by one partner is not sufficient of itself to charge the other partners, and no act can be done by one which is binding on the rest, except under special circumstances.

MOTION for a new trial in an action of assumpsit to recover the value of certain goods alleged to have been sold to the defendants. The defendants sought to have the books of the plaintiff containing the entry of sales produced; but this was

not done, nor was the person who made the entries offered as a witness, or examined by commission. The plaintiff lived in Philadelphia and the defendants in Charleston, at the time of the alleged sales. Plaintiff produced a witness who testified that he heard Oliphant acknowledge the receipt of the goods as charged in an account similar to the one now sued upon. But it appeared that this was long after the partnership of which Oliphant was a member, and which was party defendant in this action, had been dissolved, and after Oliphant had become insolvent.

The case was submitted without argument, on the sufficiency of this acknowledgment to bind the firm.

By Court The evidence was not sufficient, under the circumstances of the case, and ought not to have been admitted after the dissolution of the partnership to charge the concern. At any rate, the books of account ought to have been produced in evidence, or else their non-production satisfactorily accounted for.

Colcock, J. This action was brought to recover the value of certain goods said to have been sold and delivered by the plaintiff to the defendants, and the evidence offered to support it was the declaration of one of the copartners, who had become insolvent; which declaration was made, too, a long time after the dissolution of the copartnership. It was contended on behalf of the defendants, or, rather, the only one who was said to be solvent, that if the books of original entry of the plaintiff were produced and examined, it would appear that the goods were delivered to another person; and generally that the evidence was insufficient to prove the sale and delivery. It must be supposed that the jury thought that the acknowledgment of one copartner would as effectually bind the firm as that of an individual would bind himself; but in this they were misinformed, for it is clear that after the dissolution of a copartnership, no act could be done by one which would bind the rest, unless under special circumstances; much less can the vague, loose declarations of one copartner be permitted to operate against the rest, but no reason has been given for this attempt. From the general rules of evidence in such cases, the books of original entry should have been produced, or evidence of delivery of the goods. I am of opinion a new trial should be granted.

New trial granted.

*Ses Rootes v. Wellford*, ante 510, holding a similar doctrine.

**PARTNER'S POWER AFTER DISSOLUTION.**—For special purposes the power of a partner to charge the firm continues after a dissolution; not in fact on the same principle as when the partnership existed, but on account of a special delegation of authority. Collyer thus states: "Notwithstanding dissolution, a partner has implied authority to bind the firm, so far as may be necessary to settle and liquidate existing demands and to complete transactions begun, but unfinished at the time of dissolution." Law of Partnership, sec. 590; *Butchart v. Dresser*, 10 H. A. 453. Generally a dissolution of a partnership leaves every partner in possession of the full power, unless specially limited to one or more, to pay and collect debts; to apply the partnership funds and effects to the discharge of the firm debts, to adjust and settle the unliquidated accounts, and to make due releases, discharges, receipts and acknowledgments: *Heart v. Walsh*, 75 Ill. 200; *Ruffner v. Hewitt*, 7 W. Va. 585. Acting on this principle, the courts have denied the authority of one partner to create a liability on his late partners, which does not necessarily or impliedly arise from the previous obligations of the firm. He can only act in respect to past matters; he can no longer make a new promise which shall be their promise as well as his. Hence he cannot give a note so as to bind the late partners: *Palmer v. Dodge*, 4 Ohio St. 21; *Wilson v. Forder*, 20 Id. 89; *Haddock v. Crocheron*, 32 Tex. 276; S. C., 5 Am. Rep. 244; *Curry v. White*, 51 Cal. 530; *Brown v. Broach*, 52 Miss. 536; *Smith v. Sheldon*, 35 Mich. 42. But to exonerate the members of a firm from liability in such a case, notice of the dissolution should have been published: *City Bank v. Chesney*, 20 N. Y. 260. So the implied power of a partner, after dissolution to settle out standing business of the firm, does not extend so far as to authorize him to appear for his copartner in a suit brought against the partners, though upon a firm indebtedness: *Hall v. Lanning*, 91 U. S. 160. Bradley, J., in this case says: "In the case of *Bell v. Morrison*, 1 Pet. 351, this court decided, upon elaborate examination, that after dissolution of the partnership one partner cannot by his admissions or promises bind his former copartners. Appearance to a suit is certainly quite as grave an act as the acknowledgment of a debt. It is well settled by numberless cases that even before dissolution one partner cannot confess judgment, or submit to arbitration so as to bind his copartners: *Stead v. Salt*, 3 Bing. 101; *Adams v. Bankart*, 1 Crompt. M. & R. 681; *Karthauss v. Ferrer*, 1 Pet. 222, and cases referred to in Story on Partnership, sec. 114; 1 Am. L. Cas. 5 ed. 556; Freeman on Judgments, sec. 232; Collyer on Partnership, secs. 469, 470; Parsons on Partnership, 179, note. It is equally well settled that after dissolution one partner cannot bind his copartners by new contracts or securities, or impose upon them a fresh liability: Story on Partnership, sec. 322; *Adams v. Bankart*, *supra*.

"Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when perhaps he has a good defense to it. On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his copartners in a suit brought against the firm. It may in some instances be convenient that one partner should have such authority; and when such authority is desirable, it can easily be conferred, either in the articles of partnership or in the terms of dissolution. \* \* \* Few cases can be found in which the precise question has been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a

partner to appear for his copartners during the continuance of the partnership has been discussed. The point was raised in *Phelps v. Brewer*, 9 Cush. 390; but the court, being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it. In Alabama, where a law was passed making service of process upon one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners: *Duncan v. Tombeckbee Bank*, 4 Port. 184; *Demott v. Swaim*, 5 Stew. & Porter, 293. In the case of *Loomis v. Pearson*, Harper, S. C. 470, it was decided that after a dissolution of partnership one partner cannot appear for the other; although it is true that it had been previously decided by the same court in *Haslet v. Street*, 2 McCord, 311, that no such authority exists even during the continuance of the partnership. But the absence of authorities, as before remarked, is strong evidence that no such power exists."

A surviving partner cannot bind the estate of a deceased member of the firm for debts incurred by him subsequently to its dissolution by the death of such member: *Cook v. Carson*, 45 Tex. 429.

**POWER TO REVIVE LIABILITIES.**—Considering this subject Parsons (Partnership, 191) says: "But it does not follow that his admissions and acknowledgments, as those of one well acquainted with the facts, especially if they are against his interest, should not be received as determining a question, not of future promise, but of a past fact. We cannot but think, however, that the true principle which should decide this much-vexed question must be this: After a dissolution, however caused, the new words and acts of those who were partners shall have no effect upon the rights or obligations of their former copartners, excepting so far as these words and acts fairly belong to the settlement of the concern and the power which each partner has in winding it up." Practically, this question becomes important as to the power of a partner to make such an acknowledgment of a firm debt as will take it out of the statute of limitations, and on this the decisions differ. A leading case on this subject is *Wood v. Braddick*, 1 Taunt. 104. The question in this case arose as to the power of one partner to make certain admissions binding upon his late partners. Regarding which Mansfield, C. J., says: "Clearly, the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partnership, remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved, his account of their joint contracts should cease to be evidence; and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?"

In many of our courts the doctrine of this case is followed, and therefore the acknowledgment of one partner after dissolution as to the balance of an account has been held competent evidence to charge the others: *Final v. Burrill*, 16 Pick. 401; *Bridge v. Gray*, 14 Id. 55; *Ide v. Ingraham*, 4 Gray, 106; *Simpson v. Geddes*, 2 Bay, 533; *Garland v. Agee*, 7 Leigh, 362. In *Merritt v. Day*, 9 Vroom, 32, S. C. 20 Am. Rep. 362, it is held that payment of interest on a note drawn by a firm, by one of the members after the dissolution of the firm, but within six years after the maturity of such note, will renew it as against the statute of limitations. A very able opinion is given in this case

by Beasley, C. J. He follows the doctrine from *Whitcomb v. Whiting*, Doug. 652, where Lord Mansfield held that an acknowledgment by one of four joint promisors would take the case out of the statute. Referring to the decisions he says: "*Wood v. Braddick*, 1 Taunt. 104, was similar in the feature now under consideration, to the present case. It was an action against partners who pleaded the statute of limitations, and the bar was adjudged to be removed by an admission contained in a letter written by one member of the firm after its dissolution. This case has been often cited, and seems never to have been questioned by the English courts, and is relied upon as authority by the chancellor in the case of *Pritchard v. Draper*, 1 Russ. & M. 191. This case has likewise been expressly adopted, and its doctrine enforced in Massachusetts: *Cady v. Shepherd*, 11 Pick. 400; *Vinal v. Burrill*, 16 Id. 401; *Sigourney v. Drury*, 14 Id. 387. The same rule has been recognized in several of the other states; in Connecticut, *Bound v. Lathrop*, 4 Conn. 336 [*Beardsley v. Hall*, 36 Conn. 270]; in Maine, *Shepley v. Waterhouse*, 22 Me. 497; in Vermont, *Wheelock v. Doolittle*, 18 Vt. 440. And in North Carolina and Georgia it was explicitly held that the acknowledgment of the debt by one partner, though after the dissolution of the association, will prevent the operation of the statute: *McIntire v. Oliver*, 2 Hawks. 209; *Brewster v. Hardman*, Dudley, 138. Until quite recently this was also the settled law of New York: *Smith v. Ludlow*, 6 Johns. 267; *Johnson v. Beardslee*, 15 Id. 3; *Patterson v. Choate*, 7 Wend. 441. But the case of *Van Keuren v. Parmelee*, 2 N. Y. 523, and *Shoemaker v. Benedict*, 11 Id. 176, have taken the opposite view, reversing these earlier decisions."

Notwithstanding this able opinion, the New York doctrine is adopted in *Bell v. Morrison*, 1 Peters, 351; *Belote v. Wynne*, 7 Yerger, 534; *Mues v. Donelson*, 2 Humph. 166; *Levy v. Cadet*, 17 S. & R. 126; *Easter Bank v. Sullivan*, 6 N. H. 124; *Mason v. Howell*, 14 Ark. 199.

In some states there are statutes which define the powers of partners after dissolution, as in California, where it is provided, civil code, sec. 2462: "A partner authorized to act in liquidation may indorse in the name of the firm, promissory notes or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm by an acknowledgment when an action thereon is barred under the provisions of the code of civil procedure."

## STATE v. BRUCE.

[3 BREVARD, 264.]

**RIGHT to MANDAMUS.**—Mandamus will not lie to compel the managers of an election of sheriff to return a candidate duly elected, after they had certified to the governor that the election was null and void.

**MOTION** to set aside a writ of *mandamus*. It appeared that Nathan Hanks filed a petition for an order to be directed to the defendants, managers of election, to show why a *mandamus* should not issue to return him as the duly elected sheriff at a certain election. The petition set forth that, upon counting the votes, it was ascertained that petitioner received a majority of forty-seven votes. The answer of three of the defendants, in

which the other three concurred to the best of their knowledge, admitted that there were forty-seven votes in favor of Hanks, but that they did not declare him duly elected because the opposing candidate, John M'Ra, served them with a notice of his intention to contest the election. At the trial of the election, before the managers, they threw out the forty-seven votes in favor of Hanks, and this leaving the number of votes for each candidate equal, they certified to the governor that the election was void, and he then appointed M'Ra.

The grounds upon which the votes were rejected appearing to be bad to SMITH, J., before whom the case was argued, he directed the defendants to show cause why a *mandamus* should not issue.

The defendants showed cause as follows: 1. That this court had no jurisdiction, because the legislature has given the managers a judicial and discretionary power to judge of and determine contested elections for sheriffs, without making them liable to the control of any other tribunal; 2. That having fulfilled the duties of their appointment, and made a determination thereof according to their best judgment, their duties and office were then at an end; 3. That this court has not any power to compel them to decide, according to any judgment but their own, nor to pronounce a new judgment, after they had decided the case and given judgment; 4. The party had another remedy besides appealing to a writ of *mandamus*; 5. The office being not vacant, the officers had no right to act; 6. That all the votes taken at the poll holden at Darlington court-house, which amounted to a greater number than Hank's majority, were void, because the said votes were taken by only one manager, to wit, George Bruce, although two were appointed jointly, and commissioned by the governor for that purpose, the other manager being absent the whole time; 7. Because but three of the six managers appointed met at the place specified by law, to count the votes, etc., the other three being absent the whole time; 8. Because a writ of *mandamus* could not issue against them, inasmuch as their office was a voluntary one, which they had a right to refuse the acceptance of, and, *a fortiori*, had a right to decline acting on, when they chose.

These objections were all overruled and a writ of *mandamus* ordered to issue against the managers, directing them to return Nathan Hanks as the duly elected sheriff of Darlington district.

Motion was then made to reverse this decision.

*Levy*, for the motion.

*Blanding, contra.*

CORLOCK, J. In this case, I shall take no notice of the facts which have been brought to the view of the court, as to the illegality of the votes given, and the conduct of the managers. I feel no inclination to extend the cognizance of this court, and am of opinion that we have no power to interfere in the present contest. I would remark here, that throughout the argument, the persons who decided this question, are spoken of as managers of an election. It is true that they acted in that capacity in receiving the votes; but when the question of the right to the office was to be tried, they acted as a court for the purpose, says the act, of hearing and determining, oyer and terminer, the matter in dispute, and of course were vested with judicial powers; and being so vested without an appeal, their decision is final and conclusive. In all the variety of cases which have been quoted from English authorities, it will be observed that there was no other tribunal to which the contending parties could resort but to the court of king's bench. But here, the legislature have expressly provided a tribunal, by which the right of these persons could be decided. Had they not done so, we should have taken into consideration their conduct as managers. It was urged that this court should do so, because the court and managers were the same persons. This argument may, with propriety, be urged to the legislature, that it was not proper to make the managers judges of the correctness of their own conduct; but it can weigh nothing with me. The case relied on from Bay's reports of the commissioners of the tobacco inspection bears no analogy, in my mind, to the present case; because the power given was a ministerial one, and a rule of conduct was prescribed by the act.

In all such cases the court of sessions will say how persons shall act, but when a judicial authority is given, they can only say they shall act, but will not say how. Str. 881, 892; 3 Binn. 273. Here the persons appointed by the legislature have acted, and I am of opinion that we cannot with propriety question the justness of their decision. And further, it is a matter of importance to the community that there should be a sheriff, although it be not a matter of importance who it may be. The legislature, it is probable, intended this as a summary and expeditious mode of deciding, and, I think, never contemplated the interference of any other court. I am, therefore, in favor of the motion.

BREVARD, J. The motion in this case is to reverse the decision of the court of general sessions for the district of Darlington, by which a peremptory *mandamus* was ordered to issue to the defendants, as managers of an election for sheriff of the said district, commanding them to certify to the governor of the state the due election of the prosecutor, Nathan Hanks, to fill the office of sheriff of the said district, pursuant to a late act of the legislature of this state.

An application was made, by way of suggestion, to the district court, for a conditional *mandamus*; or, in the alternative, to certify as required by the prosecutor, or show cause to the contrary. The cause shown was deemed insufficient, and the conditional *mandamus* issued. The service of this *mandamus* was accepted by the defendants. The supposal of the writ states that the office of sheriff of Darlington district being vacant, and the defendants being appointed managers to conduct an election of an officer to supply the vacancy, according to law, held an election for that purpose, the result of which was that the prosecutor, Hanks, was duly elected, and was declared so to be by a majority of forty-seven votes.

The writ was returnable to the court of general sessions, then sitting in Darlington district, on the Friday next after the test thereof, viz.: the third Monday in March, 1812. The defendants appeared, and made a return to this effect: That the office being vacant, as stated in the writ, the defendants were appointed managers of an election to fill the vacancy, pursuant to the directions from the executive and agreeably to law. That three of them only were present when the votes were counted. That the prosecutor was not declared duly elected, nor considered so to be. That a scrutiny was demanded by John M'Ra, a candidate for the office, and that upon a full hearing upon the scrutiny, it did not appear that the prosecutor had a majority of legal votes. And that, in duty and conscience, the defendants refused to certify to the governor the election of the prosecutor, but certified, for reasons set forth in the returns, that the election was null and void. To sundry facts and circumstances set forth in the supposal of the writ, tending to charge the defendants with partiality and misconduct as managers, they reply in detail, and enter into particular vindication of their conduct and characters, and close by submitting the following facts and legal questions, viz.:

They allege that Peter Edwards was appointed, together with George Bruce, to manage the election held at Darlington court-

house; and that the election at that place was conducted by George Bruce alone; which was not according to the directions of the legislature. They further allege, that only three of the six managers appointed met at the place appointed for counting the votes and declaring the election. And they submit, whether the election ought not to be considered void, as it was not managed by all the managers appointed to manage the same, conjunctively, but by some of them in the absence of the others, and without their assistance or concurrence. They also submit, whether they can legally be compelled to make any other decision than that which they did make; or to decide by any other judgment than their own, however incorrect it may seem to be, as in quality of managers they exercised a judicial discretion, and did not act in a mere ministerial capacity. It was objected, and argued in the district court, that the return ought to be quashed for inconsistency; because, after setting forth the proceedings of the defendants as managers, and stating facts and reasons in justification of their conduct as such, the return goes on to state other facts and reasons, to show that the defendants could not legally act as managers in the premises, and were incompetent to hold and declare the election. Part of the return was quashed for inconsistency; and that which was not quashed being adjudged insufficient, a peremptory *mandamus* was ordered to issue. From this decision of the district court the defendants entered an appeal, which is the subject of the present motion. To form a correct opinion, respecting the propriety and sufficiency of the return, and the legality of the decision of the district court, it will be necessary to attend to the act of assembly, passed in the year 1808, authorizing the election of sheriffs of the several district courts by the resolution of the legislature, appointing the managers of elections for members of the legislature, passed in December, 1809.

The act of 1808 declares that in case any vacancy shall happen in the office of sheriff of any district court, by death, removal out of the state, resignation, removal from, or expiration of, office, or otherwise, the same shall be filled by an election, to be held and conducted as elections for members of the state legislature, after twenty days' notice by advertisement. And the managers are required to meet on Thursday next after the election, to count over the votes and declare the election. They are also required to certify to the governor, that the person who shall have the greatest number of votes has been duly elected, unless the election shall be contested, in which case the man-

agers are authorized and required to determine such contested election, on the grounds stated by the person who shall contest the same, on the day the votes are counted over. The act further declares, that if the election is not determined to be void, the managers shall certify to the governor, that the person having a plurality of votes has been duly elected. And the governor shall commission that person who shall be certified to him as having been duly elected. If no person shall have a plurality of votes the managers shall certify accordingly, and the governor shall fill up the vacancy in the interim, until an election shall take place. So, where an election shall be declared void, the governor shall supply the vacancy.

The resolutions of the legislature, appointing managers of the elections for members of the senate and house of representatives of this state, who were managers of the elections for sheriffs, at the time when the election in question was directed to be held, passed in December, 1809. By the resolution relating to Darlington district, it appears that George Bruce and Peter Edwards were appointed to manage the election at Darlington court-house; William Brantlett and Moses Waters, to manage at Elijah Hutson's; and Daniel Dubose and George Huggins, to manage at Enos James'. This resolution directs that one manager for each place of election shall meet at Darlington court-house, to count over the votes and declare the election. From these premises I proceed to inquire, 1. Whether the proper legal remedy in a case like the present, is by a writ of *mandamus*; and if it is, 2. Whether, under the circumstances of this case, the prosecutor is entitled to the benefit of it. This last inquiry will involve the question, whether the return to the writ ought to be deemed sufficient; and whether, although it may be, in some respects, defective, a peremptory *mandamus* ought to issue.

1. A *mandamus* is a criminal process, relative to civil rights. In England, it issues out of the king's bench, and is denominated a prerogative writ. In this country, the sources of all power and prerogative is the people. For the public good, the courts of sessions of this state are entitled to exercise the same authority and general superintendency over all inferior jurisdictions and persons, which the court of king's bench, in England, has a right to exercise; to compel them to do justice in matters appertaining to their office and duty, and to enforce obedience to acts of the legislature. And it is more especially the duty of the courts to exercise this power where the admin-

istration of justice and the public interest is concerned: Bull. N. P. 199; 3 Bl. Com. 110; 2 Esp. 665; 3 Burr. 1267. In all cases where there is a specific legal right, there ought to be a specific legal remedy; and I believe it may be safely asserted, as a general proposition, that where there is, with us, such a right, there is also a corresponding remedy. It is an established maxim of law, that where there is a specific, legal right, and no other specific, legal and operative remedy, a *mandamus* is a proper remedy, upon reasons of justice and public policy, to preserve order and good government. Where any one has been unlawfully kept out, or dispossessed, of an office, to which he is entitled, it lies to admit or to restore him: 4 Burr. 2044; 3 Id. 1266; 1 W. Black. 647.

It is always incumbent upon him, who claims the benefit of this process, to show: 1. That he has a specific, legal right; and, 2. That he has no other specific, legal remedy. It must be admitted, that the office of sheriff is of considerable importance to the public; and it materially concerns the administration of justice, and the peace and good order of civil society. It is interesting to the public, that an officer of such consideration, if he has a right to the office, and is unlawfully kept out of it, should be admitted to fill it; and if he has been unjustly and illegally removed from it, that he should be restored to it as speedily as possible. It is also an important right, which the individual who is injured, may legally insist upon, and which ought to be secured to him; the office being one of profit as well as trust. It is said to be discretionary in the court to grant or refuse a *mandamus*; but a discretion, regulated by the rules and principles of law, must be understood; and not an arbitrary and capricious discretion. Therefore, every citizen must be legally entitled to the aid of this process, who can show clearly to the satisfaction of the court, that he has such a right, as the law ought to protect and vindicate, and has no other specific remedy, of which he can legally avail himself. If, then, in this case, it should be admitted that the prosecutor is entitled to fill the office of sheriff; if the defendants ought to have certified that he was duly elected to that office, and that they improperly and illegally withhold their certificate, by means of which his commission is refused, and another person has been commissioned in his stead; and if he has no other legal remedy, whereby he can obtain adequate relief, it seems, beyond all doubt, that he is entitled to his writ of *mandamus*. Whether the prosecutor has made out such a case as entitles him to the

writ upon these principles, or not, will be the subject of inquiry in the sequel. Meanwhile, it is necessary to notice and answer the objection of the defendants, that conceding the point, as to the right of the prosecutor to the certificate he claims, and that the defendants unjustly withhold it, yet that he has another specific, legal remedy, and therefore he cannot be entitled to a *mandamus*. A *quo warranto*, it is pretended, is the proper remedy in a case of this kind. In this country, the people being the fountain of power and jurisdiction, as the crown is said to be in England, if any person or corporation take upon them to exercise any office or jurisdiction without being legally authorized so to do, the court of general sessions, possessing the powers of the court of K. B., in England, will punish them for such usurpations; and to that end it is said will require them to show by what authority they claim to exercise any particular office or jurisdiction. The old method of doing this was by *quo warranto*, which has been changed to an information in nature of a *quo warranto*. The statute 9 Anne, c. 20, P. L. app. No. 1, p. 21, extends and facilitates this remedy, in relation to usurpations of, and intrusions into, or unlawfully holding of, the offices and franchises mentioned in the act, that is, corporation franchises and offices: 2 Inst. 282; 9 Coke, 28; 6 Com. Dig. 162; 2 Str. 1213; 1 Id. 621, 299; 2 Just. 496; 2 Hawk. P. C.; Bull. N. P. 210; 1 Burr. 573.

It is easy to see that this remedy cannot be properly applied in the present case; first, because the office of sheriff is not a corporate office or franchise; secondly, because if it has been filled by the governor, in consequence of the certificate of the managers that the election was void, it has been lawfully filled; and the incumbent is not a usurper or unlawful intruder; and thirdly, because although the present incumbent may have intruded himself unlawfully into the office, and although he may be ousted from it by a *quo warranto*, yet it would not follow, as a matter of course, that the prosecutor is entitled to fill the office, nor would this process admit him to it, or reinstate him therein. The principal object of a *quo warranto* is to ascertain disputed facts, and dispossess the person who has unlawful possession. In this case, there is no necessity for ousting the person appointed *ad interim*. Besides, it may well be doubted whether, consistently with the third article of our constitution, this mode of criminal prosecution can be legally used, except in *qui tam* prosecutions, where the informer is interested in recovering the penalty, and which partake of the nature of civil actions: 4 Bl. Com. 303; Bac. Abr., *qui tam*.

It appears to me that a palpable and gross violation of public duty, by persons appointed to execute an office or trust relating to the public, or the unlawful exercise of public functions, are offenses punishable by indictment; and that proceedings, by way of information, or by *quo warranto*, are unnecessary as well as unconstitutional.

Another objection of the defendants to the proceedings by *mandamus*, is, that the office of manager of an election cannot be imposed by law on any one; that he who undertakes to act in such an office does it voluntarily, and in discharging the duties thereof, acts gratuitously; and, therefore, it is inferred that he cannot be compelled to act otherwise than seems to him right and proper. This objection is not well founded in reason, or the principles of law. If the office was one which did not concern the public, the argument might be good; but the office of managers of elections is one which deeply affects the interests of society; and if any one will accept the office, and undertake to act in it, which he is not compelled to do, he must take care to act according to law, and according to his best ability and knowledge. If he will not do so, the courts of general sessions have the power, and it is the duty of those courts, to coerce him, and compel obedience to the law. But it is again objected by the defendants, that in the exercise of the duties and powers of managers, they acted judicially as well as ministerially; and that they had a discretion, which cannot be examined and controlled by any other tribunal—unless it be to punish them for their misconduct; and, therefore, a *mandamus* does not lie. If the decisions of the managers, in the course of the election, and in conducting the scrutiny in question, were in the exercise of authorities purely judicial, and it appeared that they had kept within their jurisdiction; notwithstanding it might appear to another tribunal that their judgment was not sound, and that their decisions were erroneous, yet no writ of *mandamus* would lie, to oblige them to adopt any other mode of decision than that which their own judgment would sanction. But the authority of managers is not purely judicial. Their discretion is limited by legal restraints; and being inferior magistrates of a mixed character, even though they should confine themselves within the bounds of their jurisdiction, yet they must be subject to the visatorial jurisdiction of the court of general sessions, to regulate and correct them in the exercise of their discretionary power: 10 East, 403; 7 Id. 92. If they act from undue motives, or gross error, or misconception of the subject, it seems unques-

tionable that the court of general sessions may lawfully interpose, to prevent a failure of justice and defect of police; to vindicate the rights of the community, and promote the public welfare.

2. Having disposed of the objections to the mode of proceeding adopted on the part of the prosecutor, it remains to consider the merits of his claim, and the sufficiency of the defense which has been made in opposition to it. To authorize the interposition of the court of general sessions, by way of *mandamus*, it ought to appear to the satisfaction of the court that there is a specific legal right, as well as the want of a specific legal remedy. The party claiming the aid of this process must show a title; at any rate, a good color of title; Bull. N. P. 199; 1 Str. 536. It must be *the prima facie*, a good legal title, and not an abstract moral right. When the right plaintiff appears, a *mandamus* generally goes upon the first motion to admit him who has the right. The writ concludes with commanding obedience, or cause to be shown to the contrary: Bull. N. P. 201. If the return, upon the face of it, is insufficient, the court will grant a peremptory *mandamus*, and if that is not obeyed, an attachment for contempt: Esp. Dig. 686. If the return upon the face of it be good, but the matter of it be false, an action upon the case lies for the party injured, against the persons making such false return; and the return may be joint or several. The writ shall be taken *reddendo singula, singulis*. If the matter concern the public government, and no particular person be so interested as to maintain an action, the court will grant an information, or indictment, against the persons making the false return: Salk. 374; Bull. N. P. 202. If the return be falsified, the court will grant a peremptory *mandamus*: Salk. 340. This was the method of proceeding at common law. The statute 9 Anne, c. 20, extends and facilitates the procedure in relation to corporate offices and franchises.

The prosecutor in this case, having shown a *prima facie* legal title to the certificate claimed from the defendants, if no return had been made, or if the return, upon the face of it, appeared manifestly insufficient, it was certainly right to grant a peremptory *mandamus* to compel the defendants to do the act required of them, which it would appear to be their duty to do. But it seems to me, the return, upon the face of it, is substantially sufficient, though the matter of it may be, for aught I know, false. If the return is substantially sufficient upon the face of it, the court ought not to have granted a peremptory *mandamus*.

until the return was falsified in a civil action or criminal prosecution, wherein the disputed facts had been tried and ascertained by a jury: Doug. 157. The return is clear and express that the prosecutor was not duly elected; and the facts are stated from which this conclusion is drawn. Some of these facts have been controverted by the prosecutor, but they cannot be legally decided on but by a jury: 3 Burr. 1265; 1 Wils. 266. Before the *mandamus* was granted, it ought to have appeared that there had been a default: Bull. N. P. 199. From the return, it does not appear that there was any default which can be construed to give any right or title to the prosecutor, without prejudging questions of fact which are properly triable by a jury.

The court will never presume that a public officer has not done his duty. There is no proof that the managers have been wanting in integrity; that they have violated their oaths. If they have acted ignorantly, mistaken their duty, and made a false or inconsistent return, yet, if the right of the plaintiff is still doubtful, the court ought not to grant a peremptory *mandamus*: 2 Esp. Dig. 665. But it has been said, the return is inconsistent, and the greater part of it was quashed for that cause; and rest of the return being insufficient on the face of it, the court did right in granting a peremptory *mandamus*. To this I answer, that if the return could be considered so inconsistent as to justify the court in quashing it, yet I think it would have been more advisable to have afforded the defendants an opportunity of amending it; especially as they acted under the obligation of an oath, in a public capacity, and cannot be supposed well versed in matters of this sort, wherein scientific skill and technical ingenuity may be necessary to a complete legal defense. In addition to this, it may be worthy of consideration that there might be some danger from negligence or design of bringing into an important public office a man who is not the choice of those by whom he ought to be fairly elected, by the mere inconsistency of a return to a *mandamus*. But, waiving every consideration of this sort, I am of opinion the return is not justly chargeable with inconsistency, and that it ought not to have been quashed. I admit that a return to a *mandamus* may be quashed for inconsistency: 5 T. R. 66. But I deny that in this case there was any such inconsistency as is to be found in the cases where the return has been quashed.

In the case of *The King v. Mayor of York*, 5 T. R. 66, the return stated that Sinclair was duly elected, which could not be the case if the council had not been lawfully assembled; and

then it proceeded to state that the council was not lawfully convened, which is a palpable inconsistency. There is no such inconsistency in the present case. The defendants state the facts, which it was their duty to do, and submit the questions arising from them to the court. They do, indeed, state that the election was held and conducted, and the scrutiny disposed of, in the manner they represent; but they do not say that it was a lawful election, but, on the contrary, that the election was illegal and void; so that however inconsistently they may have acted in managing the election and conducting the scrutiny, no inconsistency is found in the return. The return is clear and distinct in stating that the prosecutor was not duly elected by a plurality of legal votes, nor considered to be so, and that the election, upon a scrutiny, was declared to be void. The inconsistency is not found in the general result or conclusion from the facts set forth; the return only shows that there was an inconsistency in the conduct of the managers in first doing, as lawful and right, what they afterwards returned to be illegal and void. This, surely, does not impeach the return, for it was their duty to state facts; and it is not improbable that, after having done what they conceived at the time to be authorized and proper, they became doubtful of the propriety and correctness of what they had done, or were satisfied that it was wrong. In either case, they have acted properly in stating the facts, and submitting the questions of law arising from them to the court. And as there is no good ground for questioning their integrity, I am of opinion their return is entitled to great indulgence. The greatest inconsistency they have committed was, in my opinion, in certifying at all, for reasons I shall presently mention. It is a reasonable and wise rule, that if it appear upon the face of the return that the party has no right to the office, though, in other respects, the return be bad, yet the court will not grant a peremptory *mandamus*. Bull. N. P. 207; Say. 39. The return is conclusive, until falsified, by the verdict of a jury, that the party in this case has no right to the office, or to the certificate he claims; therefore, the writ ought not to issue. The return, too, states a material fact, which must be taken as true, and which deserves the serious consideration of this court. And there is another fact of a like nature which appears from the proceedings, and ought to be noticed. The first is, that Peter Edwards, one of the persons who was appointed to manage the election at Darlington court-house, did not appear there and act as manager.

The second is, that the same Peter Edwards did not appear and act with the other persons appointed managers of the elections for Darlington district at the scrutiny which took place. There is nothing in the objection that only three of the six managers met to count over the votes, since one manager from each place of election did meet; and the resolution appointing the managers directs that it should be so.

It is a general rule that where the legislature expressly requires a joint execution of a power, or wherever a power is given to several persons to do any particular act, they must all concur in the execution of it; unless it should be attended with manifest inconvenience to obtain it: 3 T. R., 592: I do not know how far an argument *ab inconvenienti*—ought to have weight in such a case as this; because many acts, to be done by managers, require the exercise of judicial discretion; and all acts of judgment ought to be done together. The persons authorized to do the act, must counsel and advise, deliberate and concur. The act to be done by them must be done *uno flatu*, and proceed from their united judgment: 1 Burr. 136; 2 Bl. 1017, 3 T. R. 39; 8 East, 319; 2 Id. 244; 13 Vin. Abr. 421; 2 Just. 380; Co. Lit. 112 b; C. 113 a; 4 Burr. 2241; 3 T. R. 199; 1 Bay. 348 [1 Am. Dec. 621]. On this ground I think the election at Darlington court house was illegal, and void, and that the proceedings upon the scrutiny were void also. Also, that the defendants were not competent to certify to the governor at all as managers, without the concurrence of Peter Edwards, who was appointed jointly with them, to manage the elections for Darlington district, and certify in favor of the persons having the greatest number of votes for sheriff.

The managers are certainly empowered, by the wording of the act of 1808, to determine that an election held for sheriff is void; and so to certify to the governor; but this must be done by them all conjointly, and not by a majority. At any rate, they must all be present and act together, though a majority should have a right to decide.

There is nothing I can find in any of the acts of the legislature, or in the resolutions, respecting the appointment of managers of elections, to authorize a majority of them to act and determine in cases of election for members of the legislature, or of sheriff. It would be wise, perhaps, in the legislature, to provide against the inconveniences which may result from the obstinacy of a joint manager, or from accident; but, until they do so, I am bound to take the law as I find it, and

am clear that I have no power, if I had the inclination, to alter or amend it. If the managers who conducted the scrutiny were authorized to do so, there is an end of the question as to the right of the prosecutor to a certificate. The person who demanded the scrutiny had a right to do so; and no certificate could be given until the scrutiny was lawfully decided. It has not yet been lawfully decided, and therefore no certificate can yet be given.

Upon the whole, my opinion is, that as it must, at least, be doubtful and uncertain, whether the defendants are authorized and legally bound to certify to the governor, that Nathan Hanks, the prosecutor, "has had the greatest number of votes, and has been duly elected" sheriff of Darlington district, they cannot legally be compelled so to certify; and, consequently, that the decision of the court of general sessions, directing a peremptory *mandamus* to issue, was erroneous, and ought to be reversed.

BAY, J. delivered a concurring opinion.

GRIMKE, J., was of the opinion that the motion should be discharged.

Motion granted.

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For cases on *mandamus*, see *Runkel v. Winemiller*, 1 Am. Dec. 411; *Brander v. Justices*, 2 Id. 606; *Dew v. Judges*, 3 Id. 639, and *Commonwealth v. Rosseter*, 4 Id. 452.

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## HENNING v. WITHERS.

[3 BREVARD, 458.]

**BREACH OF COVENANT OF WARRANTY.**—In case of an eviction, the measure of damages on a breach of the covenant of warranty is the consideration paid with interest.

**CONSEQUENTIAL DAMAGES.**—Consequential damages cannot be recovered for a breach of the covenant of warranty:

MOTION for a new trial in an action on a bond.

Richardson, in support of the motion.

Simmons, *contra*.

COLCOCK, J. The defendant set up, by way of discount, a deficiency of the land which was the consideration of the bond. Both surveyors agreed that a small stream, and the adjoining swamp, for one fourth of a mile in length, and from two chains to four and a half chains in width, part of the same land war-

wanted to defendant, was taken off by a title paramount to that given by plaintiff to defendant. Upon this stream, but further down, it was proved that the defendant had built a saw-mill, which for about three months in the year would yield about one thousand feet per day; and the witness agreed, that by losing the slip of land in question, the production of the saw-mill would be lessened to about four hundred or five hundred feet per day, because the head of water would be much lessened, the defendant being unable to raise the mill-pond so as to flow the water back upon the land so taken off by the paramount title. The only dispute, therefore, was, what was to be allowed in discount for this piece of land. For the defendant, it has been said, that the measure of damages should be the value of the land, considered as a necessary appendage to the saw-mill, which had been built under a belief that the title of the plaintiff was good for the whole extent of the land, and that it was of no consequence whether the improvement, that is the saw-mill, was directly on the land or not, so it became diminished in value by the loss of the said land, and not merely the intrinsic value considered without relation to the saw-mill, which had been erected under a confident belief that the warranty of the whole land would be fulfilled. But the presiding judge charged the jury, "That the measure of the defendant's discount should be the intrinsic value of the land so lost, considered by itself, and not its value as increased by the saw-mill, inasmuch as it had not been erected directly upon the land so lost to the defendant, unless they presumed the defendant, at the time of purchase, had intended to erect such a saw-mill.

The jury allowed only one hundred and twenty-five dollars discount, and the motion is for a new trial: 1. Because the judge mistook the rule of law, which should be true measure of the defendant's discount; 2. Because the verdict is against law and evidence, particularly in not giving the defendant the damages he must have sustained in the injury done to his saw-mill, by the loss of the land taken off, though not erected upon the very land in question.

In determining this question, I find considerable difficulty arising from the diversity of opinion which has existed in ancient, as well as modern decisions, on this subject. In looking to the source from whence this responsibility as to the land took its rise, we look to the old common law doctrine; and although the forms of law have been greatly altered, the principles still remain. How was land originally held? Of some superior lord,

who warranted to the tenant; and if he were evicted by a title paramount, restored him other land of equal value, called his *Escambium*: 1 Reeves, 448. But after the statute of *quia emptores*, this was considered a mere personal contract; and an express clause of warranty was introduced, which is a kind of covenant real, as Blackstone says, 2d. vol. page 301 and in Viner's Abridgment, pages 416 and 428. "Warranty, if land be improved by the industry of the feoffee, the plaintiff in *warrantia chartas* shall recover only the value at the time of donation." To this warranty has succeeded the personal contracts usually contained in deeds. Now the question is, does any other and greater responsibility arise from these covenants, than did from the ancient warranty? I apprehend none. I conceive that the introduction of a covenant of seizin was only intended to give the grantee a speedy remedy, if he found the title of grantor was defective; for under that covenant, he might sue before eviction, if he discovered a defect in the title; but under the covenant for quiet enjoyment, he could not. In this case, the deed was not produced, and, therefore, it is not known what covenants it contained; but I consider the case as one of eviction, when if the deed contained both, both would be broken.

It seems difficult to find an adjudged case in the English law books, since the year books of 30 Edward III., 14 B., directly in point, which induces me to believe the point has long been at rest in England; and this opinion is greatly strengthened by many analogous cases, as *Speak v. Speak*, 1 Vern. 271, and *Beaty v. Dermor*, 12 Mod. 526. The civil law rule is certainly objectionable, for it is not founded on any principles of reason or justice; and, therefore, cannot assist the judgment in determining on the true measure of damages. It is said that if a man is deprived of his property he ought to receive its value at the time of such deprivation; and, therefore, one who had sold without a title, should pay the value at the time of eviction. But does he contract to do so? This appears to me to be the consideration. What is the contract? That the vendor warrants the worth of property so much as it is when he sells it. Not that if it should increase in value, or be improved to twenty times the original worth, that sum should be reimbursed on eviction. Who, I would ask, would enter into such a contract? Who would venture to sell under such responsibility? But what in my opinion shows the fallacy of the doctrine contended for, is, that the rule is not reciprocal. If the grantor is liable for any increase of value which may exist at the time of the

eviction, what shall he be liable for if the value be diminished? Suppose a valuable rice plantation be sold, and afterwards inundated by the sea, and the dams broken, and the soil washed off, and then the grantee evicted, what shall he recover? What he paid, or the value at the time of eviction? I imagine it would be said by the grantee, you must pay me what I gave for it, for it is not now the thing you sold; nor can any case or dictum be found, to show that he could be liable for less than the consideration money mentioned in the deed. I conceive that the case is settled by the case of *Furman and Elmore*. But it was said there is a difference; I, however, can perceive none in principle. The cases of *Staats v. The Executors of Ten Eyck*, 3 Cai. 111 [2 Am. Dec. 254]; *Pitcher v. Livingston*, 4 Johns. 1 [4 Am. Dec. 229]; *Bender v. Fromberger*, 4 Dall. 436; and *Lowther v. Commonwealth*, 1 Hen. & M. 201; all confirm the rule that the measure of damages shall be the consideration money, with costs and interest. Presuming that that was the sum found by the jury in this case, I am against the motion for a new trial.

Norr, J. The only question submitted to the court in this case is, whether a person in an action of covenant on a general warranty of title is entitled to recover the value of beneficial improvements put upon land, from which he has been evicted by a title paramount. In the case of *Furman v. Elmore*, it was determined that the price of the land at the time of sale, and not at the time of eviction, should be the rule or measure of damages. That seems to be admitted on all sides to be the common law rule. It was also a principle of the feudal system. The feudal investiture created a reciprocal obligation between the lord and vassal, to wit: on the part of the lord, that in consideration of the services he received, he would defend the title of the vassal; and on the part of the vassal, that he would render the services due to the lord. Yet this obligation was implied by law, and not created by any express words; and in case of eviction the lord was bound to give other lands of equal value: Co. Lit. 365; and the rule of damage was the price at the time of donation: Reeve's Hist. Eng. Law, 446. Afterwards, when express warranties were introduced, they were considered of the same import, and to amount to a feudal contract: Gilbert on Tenures, 124. "For the warranty was an express understanding to do the same thing as the feudal lords used to do to their tenants, and under the same penalties:"

Gilbert's Tenures. And the express warranty could go no further than the warranty implied in the feudal contract, since it came in the place of it: Gilbert's Tenures, 127. In most of the American courts, as far as their decisions have come to my knowledge the same rule has obtained: 3 Cai. 113 [2 Am. Dec. 254]; 4 Johns. 1 [4 Am. Dec. 229]; 4 Dall. 441; 1 Hen. & M. 202. In the states of Massachusetts and Connecticut a different rule has been adopted, but they both admit that they have departed from the common law. If then the decision in the case of *Furman and Elmore* is agreeable to the principles of the common law, it would seem to be conclusive in this case. We can only look to the value at the time of the sale; we cannot inquire what has been done since. I do not find any case in the English books, embracing this question; but the case of *Pitcher v. Livingston*, 4 Johns. 1, is directly in point. Judge Spencer, who dissented from the rule laid down by the other judges, bottomed his opinion on the particular covenants in the deed, but in this case that ground does not exist. One of the principal reasons why the improved value cannot be recovered, is because in construing a covenant you cannot go beyond the subject-matter of it. The land alone is the subject-matter of the covenant in this case, and not the subsequent improvements. Besides, reciprocity is thought to be one of the best rules by which to test the correctness of any legal principle; and according to that, if you take into consideration the improved value at the time of eviction, the converse ought to be adopted. But I believe the diminished value has never been made the rule by the common or civil law. Inconveniences will probably be found to result from any rule that can be laid down, and therefore the safest way is *stare decisis*. Let the motion be discharged. .

SMITH and GRIMKE, JJ., concurred.

Motion denied.

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See on this subject note to *Horsford v. Wright*, 1 Am. Dec. 8.

## PICKETT v. PEAY.

[3 BREVARD, 544.]

**BAR OF DOWER.**—Dower cannot be barred by the provisions of a will, unless the provision be given expressly in lieu of it, and accepted by the widow.

**DOWER.** The plaintiffs claimed by virtue of the seisin of Stark, deceased, the former husband of Mrs. Pickett. Defendants produced in evidence the will of Stark, in which there was an ample provision for his wife, although such provision was not said to be in lieu of dower, nor were there any other words of like import. The defendants contended that the jury were at liberty to consider such provision as intended by the husband in lieu of dower, and the court so instructing them, a verdict was found for the defendants, whence a motion for a new trial was made.

*Egan*, for the motion.

*Clifton*, *contra*.

**COLCOCK, J.** Dower is a legal estate, which cannot be barred by any collateral provision, except by jointure before marriage, according to the statute of Henry. It was urged that ample provision made for the widow was conclusive evidence that the testator intended it to be in bar of dower. Now, it appears to me that this would be most vague and uncertain evidence of such an intention, because it would depend upon the opinion of the judge or jury what was ample provision. One devises lands to his wife, and dies. She marries again, and brings dower, and this devise is pleaded in bar of dower, and it was held no bar. First, because the will imports a consideration in itself, and cannot be averred to be a bar of dower without it be so expressed; and, secondly, because a wife's right of dower cannot be barred by collateral recompense: 2 Bac. Title Dower, letter H. And in a note, "if lands, money, goods, etc., are devised to a woman, without saying in lieu or bar of dower, yet the wife shall have both, because a devise implies a consideration; and this has often been adjudged in chancery:" 2 Chan. 24; 2 Vern. 365; Ab. Ca. in Eq. 218, 219; Wood's Inst. 125; 1 Dall. 415. So firmly is this doctrine established, that even words of similar import to those generally used "in lieu or bar of dower" were not held to be a bar: 1 Johns. 307 [3 Am. Dec. 333]. I am, therefore, in favor of the motion.

**RAY and GRIEKE, JJ.**, concurred.

SMITH, J. The claim of dower is a common law right, of which the widow cannot be deprived by her husband, unless he makes a suitable provision for her in his last will and testament, and expresses that it is in lieu of dower, or where the words of the provision are so strong that they can admit of no other construction. There a court of equity would interpose. But in the present case, the will has made no such express or implied provision; and, therefore, I am for a new trial.

BREYARD, J. The jury were not legally authorized to expound the will in question, upon the presumption that the devise to the testator's wife, was intended to be in lieu and bar of dower, no such intention being expressed in the will. In the construction of wills, courts of equity have sometimes implied an intention to exclude the claim of dower; but only in cases where the intention appears evident from the whole scope and operation of the will, where the claim of dower would be inconsistent with, or in contradiction to, the will. In such cases, the widow must make her election; and chiefly because it is impracticable for her to take both under the will, and her dower at common law.

In this case there is no difficulty or inconsistency to prevent the widow from taking both, even if it should be conceded that a court of law is at liberty to collect from the whole will an intention to bar dower, where none such is expressed. Dower is a claim highly favored in law; and a devise imports a consideration, founded on a principle of benevolence.

The conjecture may be true, that the testator did not recollect when he published his will, that his wife might claim her dower, as well as the provision made for her by the will; otherwise, he would have qualified his bounty, or guarded against the claim of dower; but no court of justice can be warranted in deciding on such a presumption. The testator had a right to give to her what he has devised to her, without interfering with her common law claim of dower; and he has not expressed a contrary intention: See 2 Ves. jr. 578; 1 Dall. 415; *Kennedy v. Nedraw*, 1 Binn. 565; *Webb v. Evans*, 1 Johns. 307 [3 Am. Dec. 333], and the authorities therein cited. I am therefore of opinion that the motion ought to succeed.

CASES  
IN THE  
COURT OF CHANCERY  
OF  
SOUTH CAROLINA.

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CATER v. EVELEIGH.

[4 DECAUSSURE, 19.]

**LIABILITY OF WIFE'S SEPARATE ESTATE.**—The husband, acting as manager of the separate trust estate, purchased a saw-gin for the use of the estate, of which it had the benefit. The husband gave his own note for the gin, and under a belief that he was the owner of the property, the vendor sued him on the note, but found him insolvent. The wife's trust estate was held liable in equity for the price of the gin.

**APPEAL.** The case appears from the opinion. The decree of the circuit court, in which the action was commenced, was pronounced as follows:

**GAILLARD, Chancellor.** The application to the court is by petition for payment out of Mrs. Eveleigh's trust estate of a note, given by Mr. Eveleigh for a saw-gin, purchased for the use of a cotton plantation, the property of Mrs. Eveleigh, but which, the complainant says, he thought belonged to Mr. Eveleigh, he being in possession of it. Mr. Eveleigh being sued on the note, applied for the benefit of the insolvent debtors' act, and was opposed by the complainant, who alleged that he had not returned in his schedule, all his property; but a jury, finding that the property of which Mr. Eveleigh was in possession was not his own, but settled in trust for Mrs. Eveleigh, Mr. Eveleigh was discharged. As the gin was bought for the trust estate, as it belongs to it, and it has not been paid for, it is but just that the complainant's demand should be satisfied out of the estate, and it is ordered and decreed accordingly.

*Richardson*, on behalf of Mrs. Eveleigh, appealed from this decree, and contended that, admitting that the purchase had

been made for the trust estate, the complainant had taken Mr. Eveleigh's private note in payment therefor, had sued upon it at law, had taken his body under a *ca. sa.*, from which he had been discharged as an insolvent debtor, and that it was now too late to come upon the trust estate.

*Blanding, contra.*

The Court of appeals unanimously affirmed the decree of the circuit court, dismissed the appeal, overruled the demurrer to the petition, and ordered the appellants to answer in the court below.

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See *Evins v. Smith*, and note 5 Am. Dec. 557, for a consideration of the doctrine of this case.

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## LENOIR v. WINN.

[4 DEMANDS, 65.]

**EXECUTOR OMITTING TO PLEAD.**—An executor or administrator omitting to plead, but allowing judgment by default, will not thus be held to an admission of assets, so as to make him personally liable. The court will give him an opportunity of showing the fact, and decide accordingly.

**LIABILITY OF ADMINISTRATOR TO CREDITORS.**—An administrator paying debts out of their legal order or proportion is liable to creditors, and is not allowed to retain more than his proportion of the debts due to himself.

**LIABILITY FOR INTEREST.**—Executors and administrators are bound to pay interest on moneys of the estate received and not applied in due time to the payment of the debts of the estate.

**LIABILITY FOR EACH OTHER'S ACTS.**—Executors and administrators are not liable for each other's acts unless there be connivance or gross negligence.

**LIABILITY FOR NOT PAYING JUDGMENTS.**—Where the administrator neglected to pay a judgment-debt due by his intestate, and having paid inferior debts, and when a surety on a bond was obliged to discharge such judgment-debt, the administrator was held liable to satisfy, out of his own estate, such surety as a judgment-creditor.

**PRIORITY OF STATE'S CLAIM.**—If the state take a particular security or mortgage, it is not thereby deprived of its general priority in cases to which it is entitled by law.

**APPEAL** from the following decree:

**JAMES, Chancellor.** This case comes before the court on exceptions to the commissioner's report, made both by the complainants and the defendant, Richard Winn, and as the report and exceptions are very brief, for a right understanding of them it will be necessary to make a short statement of the case.

The bill sets forth that in August, 1783, Thomas Lenoir, the father of complainants, became security to a bond, in which

Thomas Baker was principal, which was made to John C. Smith and conditioned for five hundred and sixty-three pounds six shillings and six pence. That in June, 1789, Thomas Baker died, and the defendants, Richard Winn and Henry Hunter, administered upon his estate; that in January, 1790, they made a sale of his personal property to the amount of seven hundred and fifty-two pounds and three shillings, and became themselves the principal purchasers; that afterwards John C. Smith sued the said administrators upon the bond, and obtained judgment and sued out his execution; that several tracts of land were sold under said execution to the amount of three hundred and fifty-three pounds; that John C. Smith assigned the said bond to W. and T. Somersall, and that a judgment has been obtained against the executors of Thomas Lenoir, deceased, upon the same, and execution pressed against his estate. Bill further states that Richard Winn and Henry Hunter have rendered no account of their administration of the estate of Thomas Baker, and have wasted the same, and that Henry Hunter has removed out of the state to the river Mississippi. Complainants pray that the said Richard Winn and Henry Hunter may be compelled to make a discovery of what sums belonging to the estate of Thomas Baker came into their hands to be administered, and that they may be directed to pay to them the balance, if any remain, out of the estate of the said Thomas Baker, as far as it will go, and the residue out of their own estate.

The defendant, Richard Winn, states in his answer that he believes complainant's father did enter into the said bond to John C. Smith as security, and Thomas Baker as principal. He admits that he and Henry Hunter administered upon the estate of Thomas Baker and sold property to the amount of seven hundred and fifty-two pounds and nine shillings, and that he collected two other debts to the amount of fifty-four pounds nineteen shillings and nine pence, making in the whole eight hundred and seven pounds eight shillings and nine pence. In his exhibit A he makes a statement of the bonds and notes taken for the property of Thomas Baker, sold by the administrators, and states that he placed those papers in the hands of an attorney, Mr. Stark, to be sued, but he believes no part of them has been recovered by him. That the bond of Minor and John Winn, conditioned for one hundred pounds and eleven shillings, has been paid him by discount, with Minor Winn as the attorney of Man, Brown and Foltz. He admits that he purchased at the sale of his intestate's estate to the amount of

two hundred and forty-two pounds and two shillings, but that Thomas Baker was indebted on a bond to Waring, Winn and Hampton, conditioned for one hundred and thirty-two pounds and sixteen shillings, which bond was the sole property of defendant, and that defendant ought to be allowed the whole discount made with Minor Winn on the bond of Man, Brown and Foltz, and be also allowed to retain for the whole of his own debt. That Thomas Baker was indebted to the loan office by bond and mortgage in the penalty of five hundred pounds; that the lands mortgaged sold for only seven hundred and forty-five dollars, and defendant states that he is advised that debts due to private persons must be postponed to this debt due to the state, and that he is entitled to retain money in his hands to meet the said debt; that the bond of Roach to John C. Smith has been paid; that Henry Hunter purchased at the sale of his intestate's estate to the amount of one hundred and seventy-two pounds and fourteen shillings, and that he has absconded from the state, and that defendant ought not to be made liable for this debt, as not having it in his power to prevent his purchasing at the sale, or to stop him from going away. Defendant admits that John C. Smith sued the administrators upon the said bond of Thomas Baker, and proceeded to execution as stated in the bill, but submits that he has nothing in his hands to satisfy the said debt. He admits that he hath not made regular returns to the ordinary, but that he hath now filed a full account, with his answer, by which it appears he hath not wasted the estate of Thomas Baker, and therefore, that he ought not to be liable to the deficiencies of the same out of his own estate. Upon the statement of accounts in this case, the commissioner has charged the defendant with eight hundred and seven pounds eight shillings and nine pence, amount of sales of the estate of Thomas Baker, and moneys collected by the defendant, and has given him credit for the full amount of the debt and interest on the debt to the loan office, and for the average only on the bond of Thomas Baker and Waring, Winn and Hampton, and to Man, Brown and Foltz. Upon the balance he has charged defendant with interest from September, 1801, to June, 1809. To this report the complainants and defendant have filed the following exceptions, which the court will take up in the order that they occur:

First exception of complainant—"Because the commissioner has not allowed a priority to complainant's demand."

It appears that this exception is intended to be executed no

further than to a claim of priority against the debts of private persons, for in the third exception the claim of priority as it regards the state, is particularly mentioned; and here it does not appear that the complainants have stated any legal ground in their bill by which they are entitled to a priority, and the court will not travel out of it in search for one. It was indeed stated in argument, that John C. Smith had obtained a judgment on the land of Thomas Baker in his life-time, and that he afterwards renewed it by *sci. fa.* against the administrators; but if complainants wished to have the advantage of his judgment, it ought to have been stated in their bill, and an opportunity afforded the defendant to have pleaded or answered to it; without this, there is no knowing what the answer would have been. As the matter now stands, it appears that judgment was obtained upon a bond, against the administrators of an intestate, who owed other bonds; the latter bonds are, therefore, upon an equal footing with the former one, and this exception must be overruled.

Second exception—"Because the admission in the answer that judgment was had against the defendant, is an admission of assets to the amount of that judgment."

The judgment in this case appears to have been obtained in Charleston against defendants residing in Fairfield district, after a return of two *nihils* upon a *sci. fa.*; and the defendants, from the nature of the case, could have no notice of it till the execution was sued out and levied upon the property of the deceased. Whether such a proceeding be regular or not, under the laws of this state, the court has great doubt; but it will not hesitate to say, that it would be inequitable to compel a defendant to pay out of his own pocket, for default of pleading in such a case. However, after looking into the books of practice, the better opinion seems to be, "that in case an action is brought upon a simple contract, or the like, and there be debts due to others upon bonds and specialties unsatisfied, in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate:" See Sheppard's Touchstone. Now it would appear from this authority, that an executor or administrator is only bound down to such strictness in pleading where there are debts of an inferior and superior degree; but in the present case the debts are all of the same degree of specialty, and from the

death of the intestate were to be paid in the same order. The rule must have been grounded upon the advantage that creditors of an inferior degree would obtain in some cases by having judgment not subject to such a plea, but here the plea can make no difference, nor the judgment give any advantage further than to bring forward the property to a sale, and to push the other specialties. For these reasons, therefore, let this exception be overruled.

Third exception—"That the debt to the state being secured by mortgage, the state had chosen its own security, and could not resort to the personal estate in preference to the other demands."

On this exception the court has a strong leaning in favor of it for the reason therein stated; but the act of assembly appears to be imperative. Therefore, without being able to give any other reason for it, the court considers itself as bound to say, *ita lex scripta est*, and to overrule the exception.

Fourth exception—This depends upon the same principle with the last, and must be overruled.

Next as to defendant's exceptions:

First exception—"Because the defendant ought to have been allowed the whole amount of the debt to Man, Brown and Foltz."

Defendant has discounted this debt with Minor Winn, in the manner stated in the answer; but if he had ever paid it out of his own pocket, as there were debts of equal degree, all he could have claimed from creditors would have been the average. This exception is therefore overruled.

Second exception—"Because the commissioner ought to have allowed defendant to retain his own debt to the whole amount of the bond, and not in average."

The act of Assembly, Pub. Laws, p. 202, relied upon by complainant's counsel, seems to be very clear upon this point, that the administrator cannot retain the whole of his debt, but only in average and proportion with the other creditors; therefore, let the second exception of defendant be overruled.

Third exception—"Because he ought not to have been made liable for the property purchased by Hunter."

While the authority of the cases of *Bagne v. Blacklock*, and *Howell v. Administrator of Carpenter*, continue to influence this court, it will never decree upon an administration bond which has been brought only incidentally before it on a bill for a discovery filed against the administrator; on a bond there is a rem-

edy at common law; on the discovery the redress is in equity. In equity, then, the administrators can only be recognized in their official capacity and acting as such; at law, they are obligors and co-securities in a bond, and no doubt will be both equally liable. But, to make them liable here, there ought to have been shown some privity between them, or some connivance of the one at the illegal acts of the other. But no privity can exist, otherwise an action would lie against one at the suit of the other, and that is not pretended, nor has any connivance been proved. Each had it in his power to sell, to bid at the sale (though perhaps not strictly legal), and to take the property purchased into his possession. There, then, was no connivance necessary on the part of the one to enable the other to do acts which he had it in his power to do without his assistance: 2 Bro. 117. Neither has it been attempted to prove that the defendant, before the court, connived at the absconding of the other and his taking away the property. The contrary is sworn to in the answer. For these reasons, and upon the authority of the case of *Champneys v. Brown*, Barnes, 400, and the authorities there cited, the court is of opinion that the defendant, Richard Winn, should not be made liable for the acts of his co-administrator, Henry Hunter, at least under the present form of action. Therefore, let the third exception of the defendant be sustained.

Fourth exception—"He ought not to be made liable for the interest."

It has been the practice of the court of equity, in all such cases as the present, to allow interest; and the defendant has not shown any good reason in his answer why he should be entitled to any extraordinary favor of the court. Therefore, let this fourth exception be overruled, and let the defendant be decreed to account with the commissioner upon the principles above stated.

This decree was approved upon appeal; but it appearing that the bill did not state certain facts material to the case, it was ordered that the said cause be sent to the court below without prejudice, with leave to the complainant to amend, upon payment of the costs. In pursuance of such order, the cause came before the court on exceptions to the report of the commissioner upon the amended bill, which exceptions were overruled. The exceptions were, that: 1. The commissioner had not allowed the defendant, General Winn, the payment made to bond cred-

itors; and also the sum retained on the bond due to himself; 2. The commissioner made the said General R. Winn liable for the moneys received by his co-administrator, Hunter, which never came into his hands; 3. The commissioner allowed interest on the sum reported to be due to the complainants. The case came before the court upon the sufficiency of these exceptions.

DESAUSSURE, Chancellor. This case came on upon the commissioner's report and exceptions thereto. In the argument of this case, the counsel took a much wider range than the questions made by the report and exceptions; and it was contended that General Winn, the principal acting administrator, did not know, at the time of Baker's death, that the debt of J. C. Smith was the proper debt of Baker alone, to which Mr. Lenoir was only security; and that there has been great laches in the Lenoirs in their not pursuing their claim for redress, during which General Winn had applied the assets of the estate to pay other bond creditors, and especially some bond debts due to himself. And it was further contended that Lenoir only being security for Baker, his representatives, even if they had paid the debt, could not recover as judgment creditors, on the ground of judgment having been obtained against Baker by the original creditor, but could recover only as simple contract creditors for money laid out and expended. And that though the original creditor might have called General Winn, as administrator of Baker, to account for the misapplication of the funds of Baker, the security could not, at least not to the same extent and with the same effect, as the creditor might have done.

Before we consider the commissioner's report, and the exceptions to it, it is proper to examine and decide upon these questions made by the counsel. On examining the answer of General Winn, it appears that he does admit that the debt of John C. Smith was the proper debt of Baker alone. It is true he does not state when he came to that knowledge; but he does not allege that he made an appropriation of the assets of Mr. Baker before he came to the knowledge of that fact, which he certainly would have done, if the fact would have warranted his doing so. But if the fact had been so, it would not have made any difference in this case, for it was a judgment debt which the administrator was bound to notice, and he could not legally or justly apply any part of the assets of the estate of Baker, to the payment of bond debts or any other of inferior degree, until his

judgment debt was totally paid off; nor does there appear to have been any blameable laches on the part of the representatives of the security, Mr. Lenoir. It is alleged that if they had insisted on the principal pursuing his demand against Baker's estate more vigorously, the security might have been relieved, if their remonstrances had not been attended to. This is true, but it does not follow that because the security did not seek relief from the debt by insisting on the creditor's pursuing the principal debtor with rigor, that the security loses his claim to be protected and reimbursed, if he should ultimately be made liable to pay the debt. It would be a very harsh doctrine, and comes with a very ill grace from the principal, whose estate has been favored. But it is insisted that the security is not entitled to take the high ground of the original creditor, who had the bond and judgment, and must come in as a mere simple contract creditor.

In many cases, if this doctrine prevailed, the greatest injustice would be done, and securities would be wholly ruined by their kindness to, and confidence in their principal, for whom they had consented to be bound. In this particular case the innocent and helpless children of Mr. Lenoir, the security, would be deeply injured by such a doctrine. It is indeed true, that this is the doctrine at law; the narrow rules and modes of proceeding in that court prevent the judges there from giving the relief which they would be inclined to do. Hence the necessity of the interposition of this court, which being entrusted with larger powers and wider range of authority, is bound to exercise it to prevent so great an injustice as would result from the narrow legal doctrine. And this court has long exercised this power, to promote the purposes of justice, and has gone much further than this case. In *Burrowes and Brown v. McWhann, administrator of Carnes*, decided in 1794, Des. 409 [1 Am. Dec. 677], the court laid down the rule in the broadest extent. Burrowes, Brown and Carnes, were securities for Banks in a large bond to Warrington, on which judgment had been obtained against them all. Banks was utterly insolvent; Burrowes and Brown paid large sums on the debt; Carnes paid nothing, and died, leaving a good deal of property, but not enough to pay all his debts. McWhann, to whom Carnes was indebted on bond as security for Banks, administered on Carnes' estate; and finding that Burrowes and Brown had paid off almost all the debt to Warrington, he paid off the small balance on the judgment, in order to get satisfaction entered by the creditors on the judgment;

then he retained the remaining funds of Carnes, to pay himself the bond debt due him. Burrowes and Brown filed their bill to set up the judgment at law, notwithstanding the satisfaction entered on it, and to compel the administrator of Carnes to pay his proportion of the debt, before he should be allowed to retain what was due to him on his bond, and the court on full consideration, gave the relief prayed for. This case is much stronger than the one now before the court, inasmuch as the relief was given to securities against a co-security and not merely against a principal; and to give the relief it was necessary to revive a judgment on which satisfaction had been regularly entered, in order to let in the securities to the benefit of that judgment, and secure them a priority under its protecting wing. I feel myself bound then by the principles of equity, and by the decided cases, to give the relief demanded, and to support the claim of the complainants in this case. I must, therefore, confirm the commissioner's report, and agree with him in overruling the first exception made by the defendant's counsel.

The second exception is more embarrassing. In many cases, the law makes co-administrators liable for the acts of each other, as well as for their joint acts; and if I saw any ground to believe that Gen. Winn, the co-administrator of Hunter, had acted improperly in this transaction, I should make him liable. But there is no proof that he has acted in that manner. The sale was made under the authority of the court. Hunter, the co-administrator, purchased at the sale, and soon afterwards, and before the money was due, he went out of the state and carried off the property with him. There is no evidence to induce the belief that Gen. Winn was privy to this improper conduct of his co-administrator, and the court will not presume it. The interval between Hunter's purchase and his going off seems to have been so short, that it would not be reasonable to impute laches to Gen. Winn in not having collected the money due by Hunter to the estate, especially as his co-administrator had as much right to keep the money in his own hands, for the use of the estate, as Gen. Winn. I feel myself, therefore, bound to support the second exception.

We come now to the consideration of the third exception, which relates to the allowance of interest to be paid by Gen. Winn on the assets received by him, and applicable to the purposes of the estate. Upon this question, I have no doubt, Gen. Winn should have applied the assets, as soon as possible, to the payment of the debt to the public and to the debt of J. C. Smith,

not having done so, he had the use of them, and he is bound in conscience to pay interest thereon. The commissioner's opinion, overruling the third exception, is therefore confirmed.

Let it therefore be referred back to the commissioner, to state the accounts conformably to the principles of this decree.

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## ROACH v. RUTHERFORD.

[4 DESAUSSEURE, 126.]

**RESCISSIÖN OF CONTRACT FOR INCUMBRANCES.**—The court will not set aside a contract for the purchase of a house and lot on the mere allegation of an imperfect or incumbered title not clearly shown to be so, where the purchaser has been long in possession, and after a confession of judgment for the purchase-money, this being considered as a waiver of the objections; but the court might give some relief ultimately, if the title turned out to be really bad.

**BILL** in equity. Complainant alleged that he purchased a certain house and lot of defendant, giving therefor two notes of hand, and taking from defendant bonds conditioned to give a perfect title when the whole of the purchase-money should be paid; that complainant confessed judgment upon his notes at their maturity, relying upon defendant's ability to give a clear title; but that he afterwards learned that defendant had purchased the lot from one Rush, against whom there were several outstanding judgments for which the lot was liable; that defendant levied execution on the confessed judgment, and at the sale of the premises in question, purchased them for a sum much less than their value, and deterred other purchasers from bidding by refusing to show the title deeds; that complainant had made extensive improvements on the property. The defendant had also levied for the balance of his debt on certain slaves belonging to complainant. The prayer was for an injunction and for general relief. The defendant, in his answer, averred that the whole transaction was fair and honest, and offered to rescind the sale upon the payment of his debt.

*Starke*, for complainant.

*Egan*, *contra*.

**DESAUSSEURE**, Chancellor. This is an application to the court to relieve the complainant from a judgment at law which has been obtained against him, as above stated; and, indeed, to relieve him from a contract by which he became the purchaser of a house and lot in Columbia, for which he gave his notes, on

which the judgment was obtained. The relief is sought on several grounds: 1. That the defendant had not a good title in him, so as to insure a perfect and indefeasible title to the complainant; 2. That defendant has delayed very long in making out or disclosing his title to the complainant, who, therefore, is entitled to his relief; 3. That the property is incumbered by judgments, which render the enjoyment of the estate precarious.

The complainant also states that the sale of the house, made under the judgment at law of this defendant, was injured by the improper conduct of the defendant's agent, in refusing to show the titles of the vendor, by which means purchasers were afraid to engage in this purchase, and the defendant was enabled to become the buyer of the property at less than a fourth of its value; and he seeks relief from that sale. And he also seeks reimbursement for large and expensive improvements put on the lot.

I have considered the circumstances of this case, and the arguments of counsel. It was argued by the solicitors for the complainant very much as if this was a case resting solely in contract, and as if the vendor was now asking the aid of the court to carry that contract into specific execution, in which case the court exercises a high legal discretion, and either grants or refuses that aid according to the circumstances and the equity of the case. But that is by no means the real situation of the parties, or of the transaction. Upon the agreement to purchase the house and lot in question, the purchaser, Mr. Roach, was satisfied to take a bond from Mr. Rutherford, the seller, dated the nineteenth of June, 1806, by which he engaged, whenever the sum of one thousand three hundred dollars was paid to him by Mr. Roach, to make good and sufficient titles to the house and lot to the said Abraham Roach or representatives. And Mr. Roach gave his notes of hand for the amount of the purchase-money, payable at fixed periods, in the ordinary modes of giving notes. In pursuance of this agreement, Mr. Roach was put into possession of the house and lot, which he has held and enjoyed peaceably ever since, and put great improvements thereon. And by the bond which he took from Mr. Rutherford it appears that he was to pay the money before he was to have titles made to him for the house and lot. That money not having been paid at the time the notes fell due, the same, after some indulgences, were placed in suit, and judgment recovered upon them; to avoid which judgment and a sale made there-

under, and to be relieved from the contract as before stated, Mr. Roach comes to this court. This was certainly an incautious bargain, by which he put himself very much in the power of the other party; and placed himself in a position far different from that wherein the vendor is obliged to come to the court to ask its aid, to oblige the purchaser to go into a specific execution of the contract. Where the seller is obliged to come to the court for aid, a number of principles and rules are brought into operation to protect the purchaser and to secure him a good title; but a material difference is made between establishing and rescinding an agreement. In the former case a purchaser may demand an abstract of the title, and the court will at least see that he has a good title, to a moral certainty, before it will force him to accept the title and pay his money. But here all is reversed; the party gave positive notes for the money, and stipulated that he should pay the money before he should have a title. It is true, nevertheless, that the court will, in a clear and strong case, protect a purchaser against the payment of his bond for the purchase-money, or will even assist him in recovering it back, if already paid, especially if no conveyances be yet executed, provided it shall be made to appear that the vendor cannot make him a good title; or he may, if he has only made a deposit of part of the purchase-money, recover back that deposit even at law. But in such case it is not sufficient to show that the title has been deemed bad by conveyancers, but he must prove the titles bad: See Sugden, 157, and *Camfield v. Gilbert*, 4 Esp. 221.

It was objected, on the other hand, by the defendant, that the complainant could not come to this court for relief, because he might have set up the plea, which forms the foundation of his complaint in this bill, as a defense to the suit at law. That, however, is not certain, for it has not yet been settled, whether a court at law will enter into equitable objections to a title where a purchaser is plaintiff. And where the vendor is plaintiff at law, to recover the purchase-money from the vendee, the only ground on which it is said that a court of law may in such action take cognizance of equitable objections to a title, is, that as the vendor brings his action on the contract, and on the equitable circumstances between the parties, therefore, the equitable defense may be set up. This, however, is doubtful, for it rests on the authority of a single modern decision, made by the court of king's bench, in *Shaw v. Jackman*, 4 East, 201. But if the point were more settled it would not apply in this case, for the plaintiff at law, Rutherford, who is defendant in this suit, did not sue

at law on the equitable circumstances between the parties. He brought a suit upon plain notes of hand, which did not there open the contract at all. I do therefore think, that as the complainant's remedy would have been very doubtful at law, he is not precluded from coming here for relief; and this court would give him relief if he made out a proper case. This has been attempted, and the complainant's counsel have relied on various grounds to support such a case. It is insisted that the defendant ought to have made out a good title, and to have shown it to the complainant; that his refusal or neglect to do so entitles the complainant to relief; that even if he could make out a good title he comes too late for specific execution, after such a great length of time. He ought to have done it in a reasonable time; and that time is essential in such contracts. That the title, as at last made out, is objectionable, as the deed from Rush to Rutherford has never been recorded, as required by law, and as there was an outstanding judgment, which bound the land in favor of Rush, for two hundred and fifty dollars and costs.

The defendant, in answer to these objections, insists that the complainant made no such defense to the suits brought long after the contract on the notes for the purchase-money; but confessed judgment thereon, and that even when he filed a bill in equity upon another point on this contract, which was dismissed, he made no mention of the present subject of complaint. And to be sure, this conduct on the part of the complainant furnishes a strong presumption that he had been satisfied of the goodness of the title; which opinion is greatly strengthened by the defendant's swearing in his answer, which is uncontradicted in this point, that at the time of entering into the contract, he exhibited his title to the complainant, part of which is noted and set forth in the bond which he gave to make good titles; with which the complainant, after a full knowledge thereof, and of all the circumstances truly set forth and disclosed, was satisfied and entered freely and voluntarily into the contract, and did then take possession, by the defendant's permission, of the house and lot, which he has held and kept ever since, and received the rents and profits undisturbed and without any claim by any person whatever. This certainly is a very conclusive answer to the complainant; for as the title was exhibited to him, and he was so well satisfied as to give positive notes for the money, and afterwards to confess judgment on them, and to take and hold possession for many years, and to put great improvements on the lot, it is extraordinary that he

should now attempt to set up objections which he ought to have done long before. The court must listen with suspicion to such objections, after such a lapse of time. The decided cases are strong on this point, and establish that where the vendee proceeds in the treaty for the purchase, after he is acquainted with the title and the nature of the tenure, and does not object to it, he will be bound to fulfill his contract: See 4 Bro. C. C. 494; *Fordyce v. Ford*, 6 Ves. jr. 670; and 10 Id. 508; and *Calcraft v. Roebuck*, 1 Id. 221.

The taking possession and keeping it for so many years, is greatly relied upon by the court in such cases; it is even deemed a waiver of objections to the title: See *Fludyer v. Cocker*, 12 Ves. 25, 6. And this will be more relied upon in this country than in England, because it not only operates as a waiver of objections to the title, but as a positive title after a lapse of five years. For our statute of limitations fixes five years instead of sixty, as in England; and it operates as a bar to the right, and not merely to the remedy, as it does in England. Now, the complainant has been in quiet and entire possession himself of the property, for more than five years, under the permission and the consent of the defendant, who had held it sometime before. If it be answered, that this may not be an indefeasible title, as there may be infancy or coverture, or absence from the state, which would prevent the statute of limitations from being operative, the reply is conclusive. It is incumbent on you who object to this, to prove it, after such circumstances of waiver, on your part, and of complete undisturbed enjoyment by you for the full time required by the statute.

Upon this ground, therefore, I do not consider the purchaser, who is the complainant, after long acquiescence and possession, as entitled to relief in this court, to get rid of a contract under such circumstances. But, in reality, there does not seem to be any just ground to complain of the title itself, as deduced by defendant, and stated to complainant. It is deduced regularly from the commissioners of Columbia, to Mr. Rutherford. Every link in the chain seems to be complete. And if the defendant had been in default as to his title, as represented by the complainant, still, according to the decided cases, the defendant might and would be at liberty to perfect his title, at the time of the decree, so as to have the benefit of his contract. For the direction of the court to the master, is to inquire whether the seller can, not whether he could make a title at the time of

executing the agreement: See Sugden, 250; *Langford v. Pitt*, 2 P. Wms. 629; *Jenkins v. Hill*, 6 Ves. jr. 646; *Seton v. Slade*, 7 Id. 263; *Wynne v. Morgan*, 7 Id. 202; 10 Ves. 294; and this is the rule at law too: 1 Rep. Cases, 184. And these cases operate, even where there had been a limitation of time to complete the contract, for time is not generally deemed essential in such cases, though it may become so, if evident disadvantages arise to the purchaser from the delay: See *Slade v. Slade*, 7 Ves. jr. 265; 1 Atk. 12; 4 Ves. 689; 4 Bro. 469. In this case, the purchaser has no pretense, for he stipulated for no time; nay, agreed to postpone his having any title till he paid the purchase-money, and the delay of that has been his own fault.

An objection was relied on, that the deed from Rush to Rutherford has never been recorded; and that it exposes the purchaser to inconveniences from double sales, and from judgments against Rush. Undoubtedly it was a neglect in Rutherford not to have recorded this deed, and might have exposed the purchaser to serious inconveniences. But the conduct of the purchaser in so long waiving all objections to the title, diminishes his right to object at this time, and the strength of his possession takes away the apprehension of his suffering any ill consequences. Besides, the complainant has not shown that these effects have followed. The court will inquire whether any other deed from Rush is recorded, and order this deed to be recorded immediately. As to the judgment on record against Rush, it would, if it still bound this land, be a subject of compensation and deduction, and not of rescission of the contract; for it must be indifferent to the purchaser to whom he pays his money, provided he is not asked to pay more than the amount of his purchase. But according to the cases decided at law, the possession of a *bona fide* purchaser, will protect, under the statute of limitations, the holder of real estates as well as personal, against the operation of judgments. In this case, I presume, the operation of the judgment in question is barred by the statute, upon the possession proved. But some precaution may be used to make the purchaser secure beyond all doubt.

The complainant also sought relief against the sale of the house and lot, which was bought in very low by the defendant at the sale under his judgment and execution founded on the notes. I am not sure that the evidence would have borne me out in setting aside the sale in this case. There does not appear to have been any fraud intended by the friend or agent of Mr. Rutherford. But, as the sale was made at a price very

greatly below the value, and as that effect may have been produced by the extreme caution of the friend of Mr. Rutherford, which made him reluctant to produce the title deed from Rush to Rutherford, which might have discouraged purchasers, I am very glad that the defendant has offered to rescind the sale, and to give the complainant an opportunity of obtaining a fairer price for the property, if he should not be able to complete his payments, so as to prevent a resale. I gladly lay hold of this concession, which is just and proper in itself, and indicates a liberal temper in the defendant towards the complainant, to set aside the sale which has been made of the house and lot under the judgment and execution.

It is, therefore, ordered and decreed that it be referred to the commissioner, to inquire and report if there be any conveyance on record, or mortgage on the house and lot in question, from Mathias Rush to any other person than to Mr. James Rutherford; and also if there be no other judgment on record against the said Rush, than that in favor of Patton for the sum of two hundred and fifty dollars and costs of suit. And that, upon its appearing that there is no such conveyance or mortgage, the defendant do deposit the conveyances which form his title to the said house and lot, properly recorded, or certified copies of such as are not in his possession, in the hands of the commissioner, to be kept in safety by him until the complainant shall pay the amount of the purchase-money due by Abraham Roach to defendant, James Rutherford, and thereupon to be delivered to the complainant.

That with respect to the judgment standing against the said Mathias Rush, and supposed to bind the said house and lot, it is ordered and decreed that the complainant shall be at liberty to retain the amount appearing to be due on the face of the judgment and the costs, out of the purchase-money, for the space of two years; and if, in the meantime, the same shall be revived, the complainant may apply so much of the purchase-money to pay off said debt.

It is also further ordered and decreed that the sale heretofore made of the said house and lot under the judgment and execution of the said defendant, be set aside; and that upon the delivery of the title deeds by the defendant to the commissioner, for the complainant, as above directed, the injunction be dissolved, and the defendant be at liberty to proceed to a resale of the house and lot under his judgment at law. The complainant to pay the costs of suit.

## ROTHMAHLER v. MYERS.

[4 DESAUSURES, 215.]

**PAROL EVIDENCE INADMISSIBLE TO EXPLAIN MISTAKE IN WILL.**—Parol evidence, even of the person who drew the will, though of unimpeachable character, is not admissible to prove a mistake, showing that the testator intended to dispose of the property in a different manner than appeared from the face of the will.

**LEGACY TO EXECUTOR.**—If a legacy be given to an executor in that character, he cannot take it unless he qualifies as such executor.

**LAPSE OF LEGACY IN RESIDUUM.**—Where the will is so obscure that the court cannot discern the intention of the testator, the legacy fails, and the property will pass under the residuary clause.

**BILL** in equity filed by the wife and administratrix of Rothmahler to recover certain property alleged to be due to her deceased husband as one of the executors of Abraham Cohen, deceased, who had made certain bequests to his executors, Rothmahler and the defendants herein. The first question arose upon the meaning of the clause in which Abraham Cohen devised to his executors eight negroes, by name, with their issue and some house furniture, "in trust for the uses and to the purposes hereinafter mentioned, and declared of and concerning lot number fifty-four." It appeared that lot number fifty-four was not afterwards mentioned in the will, but that lot number fifty-five was; which last lot was, however, disposed of differently from lot fifty-four.

The question raised was as to the admissibility as a witness of the person who wrote the will, to explain the intention of the testator.

*Richardson* moved to examine the witness, and cited in support of his motion *Fonnereau v. Poynts*, 1 Bro. C. C. 472; *Abbot v. Massey*, 3 Ves. 140; *Goodinge v. Goodinge*, 1 Id. 331; *Hampshire v. Pierce*, 2 Id. 216; *Attorney-general v. Hudson*, 1 P. Wms. 674; and *Roberts on Fraud*, 20.

*Mitchell*, for the complainant, *contra*, cited *Roberts on Fraud*, 16; 2 P. Wms. 141.

**DESAUSURES**, Chancellor. In this case a motion is made to examine a witness who is said to have drawn the will of the testator, as to the intention of the testator, in the disposition of several negroes and some furniture.

It was argued on the part of the complainant that there was no ambiguity on the face of the will, which required any explanation by extrinsic evidence; for that it was manifest the

testator intended to bequeath this property to the executors. And again, that if there was an ambiguity, it was an *ambiguïtas patens*; in which case the court never resorted to parol evidence to explain a will.

On the part of the defendant it was insisted that there was an ambiguity, which if not allowed to be explained by parol evidence, would defeat the intent of the testator, and prevent the will from having any effect as to the property in question; that the ambiguity related to the persons whom the testator intended to benefit, and that the court generally admitted parol evidence to explain to whom the testator intended to bequeath, where there was an ambiguity on that point; that there was a palpable mistake in the clause in the will under consideration, as it referred to a subsequent clause in his will; wherein he says he devised his lot number fifty-four, conformably to which he intended the property now in dispute should go; whereas, in fact, the subsequent clause referred to, did not dispose of the lot number fifty-four, but the lot number fifty-five; whilst the devise of the lot number fifty-four had been made in a clause preceding the contested clause bequeathing the negroes; that this mistake could be explained by the person employed to draw the will, and then the testator's intention would be made plain, and his will could take effect.

I have considered the arguments, and I have examined the cases cited by the counsel on both sides, and many others which have occurred to me; and if it were my intention to decide this point definitely at this time, I would go very fully into this very delicate and difficult question. I perceive there are great ambiguities in this will, and the court wants light. But there is no occasion to make a definite decision at this time, because in this court the parol proofs are generally permitted to be gone into without prejudice: see Roberts on Frauds, p. 31, note 16. And when the evidence is before the judge who tries the cause, he can see precisely what is the proof offered, and can decide upon its admissibility much better than the court now can, where it is a mere suggestion of what the parties expect to be able to prove.

This course appears preferable, as it will tend to the more speedy determination of the cause. For if I should now undertake to decide the question, I would refuse the evidence offered; and if an appeal should be made and the court of appeals should be of opinion that the evidence should have been received, the cause would be sent down to be tried, with

directions to receive the evidence offered; and upon the decree of the court on the merits, there might be another appeal from that decree. Whereas, by the course I propose to pursue the evidence may be taken without prejudice, and offered to the judge who may try the cause, and his decree on the whole case, whether founded on such parol evidence or not, might form the subject of one appeal, which would be definitive. I shall therefore direct the examination of the witnesses offered, to be taken without prejudice, and to be offered at the trial of the cause to the judge who may try it, who will be better able to judge if the testimony actually given is admissible within the cautious rules which reason and the authority of the decided cases have prescribed for the conduct of the court. In giving this permission to examine the witness it is not my intention to prescribe the limits of the examination. I shall leave this to the judgment of the parties to offer what they please to the future presiding judge, who will receive what he may deem admissible within the rules heretofore established. But I must be permitted to say that I have no idea that parol testimony can be received to the great and dangerous extent proposed by the defendant's counsel in the paper handed to me. In the proposed examination I would particularly recommend an inquiry from the witness, whether there was any mistake in the description of the lot, to which reference is made in the contested clause by the number fifty-four; and to say whether the testator meant number fifty-four or number fifty-five, which last is the only one devised in the subsequent part of the will; and which, if clearly explained by the parol testimony (and received by the judge), would tend more to the elucidation of the difficulty than anything else within the range of admissible testimony.

Let the witness be examined on interrogatories without prejudice, and the examination when taken be submitted to the judge who may try this cause, to be admitted or rejected in whole or in part, as to him may appear to be correct.

The witness was examined and the cause came to a hearing, *Blanding*, representing the defendants.

*Silliman and Carr, contra.*

JAMES, Chancellor. The question to be considered in this case arises out of three clauses in the will of Abraham Cohen, which are to the following effect:

First clause—"Item, I devise unto my executors, hereinafter

named, and the survivors or survivor of them, my lot of land, number fifty-four, on Princes street, in trust for the use of Margaret M'Wharter during life, and after her death, then I give and devise the premises to my niece, Dinah Cohen, her heirs and assigns."

Second clause—"I give and bequeath unto my executors, hereinafter named, and the survivors or survivor of them, eight negroes (naming them). Also, my household and kitchen furniture, etc., in trust for the uses hereinafter mentioned and declared, of and concerning the lot number fifty-four, and for the sole use of Margaret M'Wharter during her life, and after her death, that the above described goods and chattels shall be equally divided between them."

Third clause—"I devise unto my nieces, Sarah Myers and Esther Myers, or the survivor of them, the house and lot (No. 55), fifty-five, on which I now reside, in Princes street."

Erasmus Rothmahler was one of the executors named in the will of Abraham Cohen, but did not qualify, and his administratrix, by her will, now claims a part of the personal property mentioned in the second clause above cited, on the ground that the words "shall be divided equally between them," can relate only to the word "executors," as their proper antecedent. Her claim, therefore, is founded on grammatical construction alone. But I cannot think the complainant is entitled under the will, because the testator has discovered no intention to give the executors anything expressly, either by stating it was on account of his friendship for them, or on account of their trouble in the management of his estate. But admitting that the legacy had been given expressly to Erasmus Rothmahler, upon the authority of the case cited, he could not have entitled himself to it, unless he had acted as executor: see *Abbot v. Massie*, 3 Ves. jr. 148. Besides, if these reasons were not sufficient to make the executors trustees, to preserve a remainder which they were themselves to take, would be entirely unprecedented. If the second clause had stood singly, a construction in favor of the executors upon grammatical rules might prevail, but the context does away every presumption in their favor. A will is not to be construed *per parcella*, but by the entirety, and to support the intention a construction may be made upon the whole will, even against strict grammatical rules. Thus far as to the claim of the claimant, which is the only question made by the bill.

The answer has brought into view two other conflicting claims. The first is that of Dinah Cohen, now Mrs. Minis, under the

first clause, and the second is that of the other two nieces, Sarah and Esther, under the third clause. Mrs. Minis claims all the negroes and other property mentioned in the second clause, because that by it the said property was to pass in and for the uses declared concerning the lot fifty-four. Now, after the life estate the uses of the lot fifty-four were declared to be for her, and so she contends ought also the uses of the negroes. That to effectuate this, it would be only necessary to rectify a mistake of the testator, and instead of the words "hereinafter mentioned," to read the words "hereinbefore mentioned," in the second clause of the will recited as above. On the other hand, the other two nieces urge that the words "lot No. 54" have been used by mistake by the testator, in the second clause, instead of the "No. 55," and that if the court would only rectify this small error in the will, it is plain they would be entitled to the property.

Such are the claims of the three nieces, the first praying for a greater, and the two last for a lesser alteration of the will. Perhaps the intention of the testator was to leave the property in question equally among them. I was much inclined on the first opening of the case to think so, and therefore referred it to the commissioner to report how their portions under the will would stand in the scale of equality, if the one third of the personal property were added to them respectively. In the mean time, I examined the context, to see if such intent could be discovered in the general scope of the instrument. Such intention, however, does not appear to be clearly expressed, and the difficulty seems to be inexplicable. The ambiguity is inherent in the will itself; it is, according to the legal phrase, a patent ambiguity, and cannot be explained by extrinsic evidence. It is a case of the absolute omission of the names of legatees; and nearly the same as where a blank is left for the insertion of such names, in which case parol evidence is always excluded: see 3 Atk. 257, by Lord Hardwicke, in which the difficulty does not appear to have been so great as in the present case. I am well aware that the doctrine in favor of legatees has been considerably extended by modern decisions. This sufficiently appears from the cases of *Dobson v. Waterman*, and *Selwood v. Mildmay*, cited by the counsel from 3 Ves. jr. 306.

In the first of these cases, the testator bequeathed to J. D. seven hundred pounds, in three per cent. consolidated bank annuities, and was not at the time of making his will, or of his death, possessed of any such annuities, but owned one thousand

eight hundred pounds three per cent. south sea annuities. In the second case, the testator bequeathed to his wife during life the interest of one thousand two hundred and fifty pounds, part of his stock in the four per cent. annuities of the bank of England; and after her death to other legatees. It turned out that the testator had no such stock, but at the time of his death was possessed of one hundred and thirty-seven pounds per annum in long annuities. In both cases the ambiguity was decided to be latent; a resort was had to extrinsic evidence; the mistakes were naturally accounted for and rectified, and the legacies were established, to be paid out of the stock which the testator died possessed of.

In the present case, it was contended, and I think properly, that parol evidence was inadmissible. However, it was admitted by the court, without prejudice, on the authority of the standing rule to that effect in equity. But the witness has not been able to solve the difficulty. He is not able to account for the mistake, as was done in the cases cited, and he even tells us that the ambiguity is to him inexplicable. This makes a wide difference. In the cases cited, the mistakes could be rectified by the state of facts; in the principal case, they cannot be rectified, either by the context or the state of facts. The words, "to be divided equally between them," referring to nobody, are vague and uncertain. To give them any sense, I must add legatees, which would not be to explain, but to make a will. I am, therefore, of opinion, that the nieces cannot take under the second clause of the will above cited; and that, according to the rule of law in such cases, where a legacy fails as to a particular object, it must pass to those entitled under the residuary clause.

Therefore, it is decreed that the property in dispute be equally divided between Solomon Cohen, the brother of the testator, and his nephews and nieces in the will mentioned, who were alive at the time of his death, agreeably to the terms of the last-mentioned clause; and let the complainant's bill be dismissed, with costs.

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In *Finklea v. Jordan*, 14 Rich. Eq. 160, it is held that where a legacy is given to one who is appointed executor, the presumption is that it was given to him in that character; and it lies on him to show something arising on the will to repel the presumption.

# ST. LUKE'S CHURCH v. MATHEWS.

[4 DESAUSSEURE, 578.]

**CONTRACT WITH OFFICERS DE FACTO.**—A clergyman entered into a contract for a year's service with a vestry, who were not legally elected, but who, as far as he knew, were the officers *de facto*. Having performed the duties according to such contract, he was held entitled to recover for his services.

**CONTRACT VOID—WHEN.**—But when, apprised of the illegality of the election of the vestry, he made with them a contract for the ensuing year, it was considered proof of collusion, which should prevent him recovering for services during this time, and a perpetual injunction was decreed against any suit for services rendered during the second year.

**VALIDITY OF BY-LAW.**—The right of a corporation to make by-laws is unquestionable, but they must be conformable and subordinate to its charter; and they must be reasonable.

**BILL** in equity, praying for an injunction. The case appears from the opinion.

*Huger and Pettigru*, for the complainants.

*Morrall*, *contra*.

**DESAUSSEURE**, Chancellor. This is a bill filed to restrain the defendant from availing himself of a judgment at law, obtained for a year's salary, alleged to be due to him on a contract made with the vestry and wardens of the Episcopal Church of St. Luke's parish, to serve as rector of that church, from Easter, 1811, to 1812.

The bill states "that the defendant was rector of St. Luke's church, by the appointment of certain persons, who had usurped the office of vestry and wardens; and that the defendant was knowing to the usurpation, and, therefore, came in by collusion with them." That such was the intimate understanding between the defendant and these usurpers, that the terms of agreement were that the defendant was to be paid as long as he chose to continue with them. That when the title of these usurpers came to be examined in court, on a motion for a *mandamus*, the application was dismissed, because the *mandamus* was not the proper remedy; of which cause of dismissal the presiding judge informed the parties, and apprised them, that the tenure by which those persons held their offices was illegal; yet after this the defendant renewed his engagements with the usurpers in question. That the complainants were not satisfied that the defendant is recognized as an Episcopal minister, by the church of this state. That the complainants, and the body of the

parishioners, never concurred in defendant's appointment, but regarded him as an unfit person, on account of the reports which had reached them, concerning his general character. That the defendant Mathews has obtained judgment at law, for the amount of one year's salary; and issued his execution, and threatens to levy upon, and sell the church.

The bill prays for an injunction against the judgment at law, and that the complainants may not be further troubled at law. The answer of Philip Mathews denies that he had any knowledge of any conspiracy between the vestry and wardens elected in April, 1811, to retain their appointments, in despite of the wishes of the congregation; that defendant for five years before he came to St. Luke's parish, had been rector of the Episcopal Church of St. James, Santee; that receiving pressing letters from Captain J. W. Alston, an officer of the church of St. Luke, encouraging him to expect the appointment to that church, with a salary of one thousand four hundred dollars, to be the minister for St. Luke's and Hilton Head, he was induced to leave his residence; that at that time the defendant was entirely ignorant of any contention existing in St. Luke's; that on his arrival, he found in office J. W. Alston and others, who appeared from the books of the said church to have been members and officers of the same for several years, by whom the defendant was engaged to preach every Sunday in said church, for a salary of eight hundred dollars; that although the defendant was present on the day of election, in April, 1811, having come into the parish only the evening before, he was entirely unacquainted with the nature of the controversy between the conflicting parties of the said church. But he understood it at that time to be a contention who should have the disposition of the funds of the said church. The defendant further states, that the charge of complainants, that the defendant is not a legally ordained minister of the Episcopal church, is false and unfounded; he having been ordained by Bishop Madison, who conferred on him the grade of deacon and priest's orders, on the same day, as would appear by exhibits filed with the answer. That the defendant is recognized by the parish of St. Helena, as its rector, and has been returned by the vestry to Bishop Dehon, who promised to enroll his name; having been previously enrolled, to wit, in 1805, by the standing committee.

This defendant further states, that he agreed with the vestry and wardens of St. Luke's, to serve as rector for the year 1812 (which was his second year), before the court of common pleas

had pronounced any decision on the question then in litigation; as the said vestry and wardens were then recognized by a large portion of the congregation. That J. W. Alston was either a warden or vestryman, for several years, before any dispute originated; and that this defendant did not abandon the said congregation, till he found that he could not reconcile them. That the charge of collusion with usurpers is untrue, for at the time of passing the by-law, so much complained of, the defendant was in the enjoyment of the rectory of St. James.

Defendant defies his enemies to substantiate a single charge of criminality on him. That during the first year of defendant's services in the church of St. Luke's, the church was well attended on Sundays, and would have continued so had it not been for party animosities. That the defendant did not know the papers belonging to the church had been detained till informed thereof by G. W. Morrall, who had detained them, because what was due to the defendant was withheld by men illegally elected. That the defendant having received no compensation for his two years' services (so that his board and physician's bills remained unpaid), commenced an action at law to recover his salary of the year 1811, and obtained judgment therefor; and his attorney proceeded to levy on any property he could find; that defendant was unwilling to levy on the church, but the present vestry refused to pay him in any other way. The answer denies combination.

On the trial of this cause, the following evidence was produced:

The act of the legislature of the twenty-ninth of February, 1798, incorporating the Protestant Episcopal Church of St. Luke's, and sundry others therein named, by which it is enacted "that the vestry shall be elected in manner accustomed." To show what "the manner accustomed" is, the act of the thirtieth of November, 1706 (see Trott's Collection of the Laws, No. 260), was produced. By s. 30, p. 138, it is enacted, "that on Easter Monday in each year, the inhabitants of each parish, that are of the religion of the church of England, and that do conform to the same, and that are either freeholders within the same parish, or that contribute to the public taxes and charges thereof, or so many of them as shall think fit to attend, shall meet at their parish church (or for want of one, at some appointed public place), and there elect seven sober and discreet persons, that are of the religion of the church of England, and do conform to the same, and that are either freeholders within the same parish, or

that do contribute to the public taxes and charges thereof; to be vestrymen for the said parish for the space of one year." And church wardens are to be annually elected at the same time and by the same persons.

To show that the election of vestrymen and wardens of St. Luke's, which took place on Easter Monday, in the year 1811, was not made in the manner accustomed, the journals of the proceedings of the vestry of St. Luke's were produced, by which it appeared (see page 59) that on the eighth of April, 1811, the then vestry entered into a resolution, which they called a by-law, by which it was enacted that every person desirous to join the church of St. Luke's, should pay the sum of fifty dollars, or he should not be admitted a member nor be entitled to its privileges. By the same journal, page —, it appeared that an election of vestrymen and churchwardens took place on the fifteenth of April, when Mr. Josias W. Alston and sundry other persons were entered as elected. It also appeared by the same journal that, on the sixteenth of April, 1811, a resolution was entered into by the vestry so chosen, to employ attorneys to defend the rights of the vestry. And that, on the twenty-seventh of April, 1811, the vestry resolved to authorize the churchwardens to employ the Reverend Philip Mathews as a rector of the church, for a year, at eight hundred dollars per annum. And that, on the second of November, 1811, several persons were admitted to be members of the church, who were approved by the vestry. So, also, on the seventh of March, 1812. On the thirtieth of March, 1812, there appears to have been an assemblage of the vestry to try the Rev. P. Mathews on a charge of infidelity, said to have been made by St. R. Proctor; but refusing to give evidence, as he denied the power of the vestry, Mr. Mathews was acquitted.

By the same journal it appeared that, on the twenty-eighth of November, 1812, the vestry entered into a resolution to employ Mr. Mathews as the minister of St. Luke's, till he chose to resign by letter, at six hundred dollars per annum, which was done on Mr. Mathews' own motion. There was also a letter by the vestry to the bank in Charleston, dated twelfth July, 1811, which related to the money of the church, of which they claimed the disposal, though its payment to them was forbidden by those who thought them illegally elected. The minutes from the court of sessions were produced in evidence, by which it appeared that a rule was taken out on the — day of April, 1811, for the vestry and wardens of St. Luke's to

show cause why the election should not be set aside as irregular. Several witnesses were called. Those on the part of the complainants testified that they were present at the election of vestrymen and churchwardens for St. Luke's church, in April, 1811. That the new rule, requiring the payment of fifty dollars as a qualification to vote, was enforced. That they never heard of the rule till the day of election; and that a much greater number of persons were rejected from voting by the operation of that rule, than the number who voted. That the great bulk of those who were rejected were Episcopalians; and that they would have voted against those who were elected vestrymen, as they expressed their sentiments openly, but were prevented from voting by the operation of that by-law. Their votes would have changed the election. The witnesses did not see any of those who had been actually subscribing, and recognized members of that church, prior to the by-law, refused permission to vote; but all who were entitled, and then came for the first time to subscribe and to vote (and these were many), were refused unless they paid the fifty dollars required by the new by-law; and many of the old members refused to vote on account of that law. Almost all who were rejected on that day became regularly members of the church as soon as they could.

Mr. Mathews was present on the day of election, and saw and heard the contention among the people. The by-law was produced and discussed, and all present knew of it; and one of the witnesses thought he, Mr. Mathews, must have known that the by-law was deemed illegal. Another of the witnesses heard Mr. Mathews answer Mr. J. W. Alston, that he had got one of his letters of invitation to come to the parish; also heard him lament the differences existing, and say that he would leave the parish speedily.

Mr. Mathews said, about the close of his stay in the parish, that there were great abuses in the books of the church, which ought to be put to rights.

Two witnesses were produced on the part of the defendant, one of them testified that he did not see any of the old members of the church (former members) repelled from voting. That several persons present were strangers, to wit, Dr. Proctor and Mr. Patterson. Some came from curiosity, and some from other churches. That Mr. Mathews was present, but he was a mere stranger. The witness heard him say that he regretted the dissensions he saw among the people, and it would be his duty to heal them.

Another witness said that he attended once at the church, soon after Mr. Mathews was pastor, and he had a full congregation. On his examination he said that he had learned from Captain Josias W. Alston, that the object of the by-law was to keep others out who might incline to put out the then vestry and put in others.

I have been thus full in stating this case from the importance of the principles involved in it, as well as from the great interest taken in the cause by a respectable church and community. The questions made in the cause were as follows:

First, Whether the defendant, Philip Mathews, was a regularly ordained Episcopal minister of the gospel, entitled to perform the functions of a clergyman of that denomination?

Second, Whether he was regularly appointed rector of St. Luke's, by a vestry regularly elected, and duly qualified to act in that behalf?

Third, Whether the persons acting as vestrymen, if not duly elected, were such a vestry *de facto* as would authorize their acts, and bind the church to pay for services actually performed?

Fourth, Whether the defendant, P. Mathews, colluded with a vestry, illegally elected, and thereby deprived himself of the benefits of the contract made with them, as a vestry, and performed by him?

The first question was not discussed, for, notwithstanding the doubt stated in the complainant's bill, the defendant gave a distinct and positive answer, affirming that he was a regularly ordained clergyman of the Episcopal church, which he supported by documents, and which were not contradicted by any testimony. The counsel for the complainants candidly gave up this point, for defect of proof; and we must consider Mr. Mathews as a regularly ordained minister of the gospel, capable of performing all the functions of that holy office in the Protestant Episcopal church.

The second question involves two points: 1. Whether Mr. Mathews was regularly appointed by the vestry to be the rector of St. Luke's parish, in the year 1811? 2. Whether that vestry were regularly elected, and duly qualified to act in that behalf?

There does not seem to be any difficulty on the first point. The entry in the journals of the church shows that Mr. Mathews was duly appointed by the vestry on the twenty-seventh of April, 1811, to be the rector of the church of St. Luke for

one year, at a salary of eight hundred dollars, and the evidence shows that he accepted the office and performed the duty.

The second point requires more discussion. The right of a corporation to make by-laws is not questioned, but they must be conformable and subordinate to the regulations of the charter, and they must be reasonable. If we test by these rules the by-laws made a few days before the election, and kept secret from all but a few until the day of election, requiring that each inhabitant of the parish, otherwise entitled to a vote, should be obliged to pay fifty dollars before he should be allowed to vote, we shall find it will not stand an examination. The act of incorporation of 1788, directed elections to be made in the customary manner, and the ancient law which fixed that manner, allowed all persons residing in the parish, or paying taxes therein, and conforming to the Protestant Episcopal church of England, to vote at the elections for vestry and wardens. The new by-law, requiring a new qualification to entitle persons otherwise qualified to vote, was therefore an attempt to transcend the powers given and to alter the qualification of voters, and was a violation of the charter. The by-law was therefore a mere nullity. The manner, too, of the enactment, a few days before the election, and kept secret till the people were assembled, when few could be prepared to comply with the new by-law, and the object avowed to one of the witnesses of defendant, to exclude persons who might interfere with the then vestry, rendered this an unreasonable by-law. And it was unreasonably exercised; for we perceive that an attempt was made by the vestry to make the right of voters depend upon their approbation, even when they complied with the by-law, by paying the fifty dollars required: see two entries to that effect. It is true, it is said in 3 Burr. 1833, that when the electors are described in the charter, their numbers may be restrained by a by-law, in order to avoid riot and confusion. But it is added, that a by-law cannot strike off an integral part. This power, if it really be lawful to a corporation, must be exercised with great caution, with no sinister designs, and without counteracting the charter or substituting a new rule to entitle it to support. It deserves no support under the circumstances of this case. Upon every ground, therefore, I am satisfied that the by-law was unwarranted and illegal and void, and that those who, by virtue of its sudden and unexpected application, as was pretty strongly proved by the witnesses, were elected vestrymen under it, were illegally elected; and

though they might not, perhaps, be said to be usurpers, as they held under color of an election, however irregular, yet they were unlawfully in, and held their office *de facto*, and not *de jure*.

And this brings us to the consideration of the third question, whether the persons acting as vestrymen were such a vestry *de facto*, though not *de jure*, as would authorize their acts and bind the church to the contract made with Mr. Mathews. And it does appear to me, after the best consideration I can give the case, that they were a vestry *de facto*, and that their contract with Mr. Mathews (unless we suppose he acted by collusion with them) bound the church, and entitled him to the payment stipulated, when he had performed the service. In the case of *The People v. Collins*, reported 7 Johns. 549-554, it is laid down by the court, in conformity to the old cases, that the acts of commissioners, though coming in, or acting irregularly, and liable to a penalty, or to be turned out, were the acts of commissioners *de facto*, since they came to their office by color of title; and that it is a well-settled principle of law, that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done; and this rule is adopted to prevent a failure of justice. "The limitation to this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility." So, also, *The King v. Lisle*, Andr. 5, 263; T. R. 56; Cowp. 413; Salk. 43; Ld. Raym. 1244.

During the year for which these men were so irregularly elected, they could be removed only by a *quo warranto*: 2 T. R. 239; 1 East, 78; 1 W. Bl. 445; 3 Burr. 1454; 4 Burr. 2008. In *The People v. Runkle*, 9 Johns. 147-159, the court again laid it down, that trustees, even if not regularly elected, were at least trustees by color of office, and their acts would be good. In 1 Wooddes. 491, it is laid down from 2 Lev. 242, that if an officer *de facto* perform a corporate or judicial act, as if a mayor seal a bond, or a sheriff pronounce a sentence, their proceedings are valid, though they are not *de jure* qualified for their respective stations. There must, however, have been an election, however irregular, otherwise he is a mere usurper. Being sworn in, and acting, do not, without an election, constitute an officer *de facto*: 2 Str. 1000. Now the act done by the vestry *de facto*, who came in by color of title, in the case under consideration, was precisely the act which, if they had been duly elected, they ought to have done. They appointed a clergyman to fill the vacant church. It was not an arbitrary act, and can scarcely be called a voluntary one, for it was a duty to fill the vacancy. The con-

tract made by the vestry, in this case, with Mr. Mathews, to serve the congregation, as their minister, for a year, seems to be analogous to the presentation and induction in England, which put the clergyman in complete possession of the benefice, though admitted on a wrongful and illegal presentation; though insufficient and illiterate, for he is a parson *de facto*, and the acts creating him so are not mere nullities: 1 Wooddes. 315. A clergyman presented by a stranger, that hath no right, is not liable to be dispossessed, even by the patron, but he lost his turn of presentation by it, because the intent of the law in creating this species of property, being to have a fit person to celebrate divine service, it preferreth the peace of the church (provided the clerk were once admitted and instituted) to the right of any person whatever: see 3 Bl. Com. 342, 343. Unless, therefore, there was collusion between the vestry *de facto* and Mr. Mathews, I consider his appointment valid, and that he is entitled to the stipulated reward for the first year of his services.

This brings us to the consideration of the fourth question, which is, whether Mr. Mathews did collude with the vestry *de facto*, knowing the illegality of their election? And is he thereby subject to be deprived of the stipulated salary, after performance of the service? The defendant, Mr. Mathews, in his answer positively denies the collusion charged, and states that being in possession of a benefice in St. James's Santee, he was invited by an officer of St. Luke's church, whose legality at that time had never been questioned, to come to St. Luke's parish, to be employed in that church. That he arrived the evening before the election of the vestry and church wardens, and was present at the election on the fifteenth of April, 1811. That he saw much discord, but he was not acquainted with their regulations, nor could he judge of the points in controversy among the parties. That he verily believed the point in dispute related to the disposition of the funds of the church. He was appointed rector of the church by the vestry elected in April, on the twenty-seventh of that month, for one year, at eight hundred dollars. And he remained in the parish and performed the duties of his station. To the peremptory denial of collusion made by the answer, there is nothing opposed but the proof that Mr. Mathews was present at the election and saw the strife which prevailed; and one witness thought he must have heard the discussion about the by-law, and have known of its illegality, and yet consented to be employed by a vestry so elected. Whence the collusion is inferred. It is indeed very

probable, as the witness supposed Mr. Mathews heard the discussion on the day of the election. But it would be too much to infer, contrary to his express denial on oath, that he understood the subject so well as to be able to determine on the legality of the by-law, and the regularity and the validity of the election. It required particular attention to the facts, and some legal discrimination, to decide upon the validity of the proceedings. I cannot, therefore, say that I am prepared to pronounce that such a case of culpable collusion has been made out, as would justify the court in setting aside the contract, where the party has performed his part of it.

It is said that a rule of court was taken out in April, 1811, for the vestry to show cause why a *mandamus* should not go out against them. But Mr. Mathews, who was appointed about the same time, is not proved to have known of this rule; and if he had, it is not certain that he was bound to act upon it until the determination of the court was known. It would be too great a hardship on a clergyman to make the payment of the sum due him for services performed to depend on the regularity of the election of the vestry, and upon the correctness of his legal judgment upon the points in controversy between the parishioners. A very flagrant case of misconduct on his part, and of plain and culpable collusion with the party, palpably in the wrong, would alone warrant the interference of this court to deprive him of the benefit of his labors. It is of great importance throughout this case to remember that the act done and complained of was not in itself incorrect, but was precisely the act which duty required the vestry, whether *de jure* or *de facto*, to perform, to wit, the filling the church with a clergyman of the Protestant Episcopal Church to perform the duties of that holy function.

Upon the whole, therefore, I am of opinion that Mr. Mathews was entitled to the salary stipulated to be paid him for one year's service, from April, 1811, to April, 1812. I do not know whether the proceedings in this case are so made up as to require the judgment of the court upon the claim of Mr. Mathews for compensation from April, 1812, to the time he left the parish. But the prayer of the bill for relief seems to reach the whole case, and the parties went into evidence on the contract made in November, 1812. So that I presume the judgment of the court is desired. And as it may prevent further litigation, I have no objection to give it.

Upon that point, I have no doubt Mr. Mathews had been long

enough in the parish to know the whole controversy; the books and proceedings were under his eyes, and he must have known that the judgment of the court of law was against the legality of the election of the vestry, his patrons. With a full knowledge of all these circumstances, and that the vestry was an illegal body, acting without authority and against the will of the congregation, he renews his engagement with them; nay, it is on record, that he himself is the mover in the vestry that he should be employed indefinitely, until he chose to resign by letter. This was a plain and willful collusion of a culpable nature, and he became an usurper. The congregation in disgust withdrew from him, and he frequently had no auditors, and was obliged to abandon the church. If, therefore, Mr. Mathews has wasted his time uselessly to others, and without benefit to himself, it is his own fault. He is not entitled to compensation.

It is therefore ordered and decreed, that so far as the complainant's bill seeks relief against the judgment at law, for the year's salary claimed by the Reverend Philip Mathews, under his first contract with the vestry *de facto* of St. Luke's church, the same be dismissed and the injunction dissolved. And that so far as regards any demand which he may have against the Protestant Episcopal Church of St. Luke's Parish, under or by virtue of any subsequent contract with the persons claiming to be the vestry of said church, or for services alleged to have been rendered by him, that he be forever enjoined from prosecuting the same.

It is further argued and decreed that the costs of suit be paid by the complainants out of the funds of the church.

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As to the character of by-laws which a corporation may enact, the doctrine of this case is approved in Angell & Ames on Corporations, sec. 118, and Field on Corporations, 332. Angell & Ames, sec. 286, thus notices the doctrine in relation to the powers of officers *de facto*: "Though the charter or act of incorporation prescribe the mode in which the officers of a corporation aggregate shall be elected, and an election contrary to it would unquestionably be voidable, yet if the officer has come in under color of right, and not in open contempt of all right whatever, he is an officer *de facto*—within his sphere an agent of the corporation, and his acts and contracts will be binding upon it."

## JAMES v. MAYRANT.

[4 DESAUSSE, 591.]

**WIFE'S TRUST ESTATE CHARGED.**—Where supplies are furnished for the benefit of the wife's trust estate, such estate is chargeable in equity with payment therefor.

**APPEAL** from a decree of the chancellor dismissing complainant's bill, by which Halloway James sought to subject a trust estate to the payment of a promissory note given in his favor by John Mayrant, one of the *cestuis que trust*. The facts appear from the opinion.

*Silliman and Blanding*, for the complainants.

*Miller, contra.*

By Court, GAILLARD, Chancellor. The complainant seeks to subject to the payment of his debt the profits of a trust estate, the trusts of which were declared by decretal orders of the court of equity, in 1794 and 1795.

The first was made on the twenty-eighth of March, 1794, *Mayrant v. Davis*, 1 Desauss. 202. In this case the court confirmed the report of the master in some matters not necessary to be noticed here, and ordered that, on a final report of the master, whatever balance might be found due to Mr. Mayrant in right of his wife, should be considered as settled on his wife in manner as should be directed by the court. On the twenty-eighth of March, 1795, the balance due being ascertained, the court ordered that the same should be settled on Mrs. Isabella Mayrant, Captain John Mayrant, and their issue, under the direction of the master.

On the *ex parte* application of Mrs. Mayrant, by her next friend, William Mayrant, on the twenty-eighth of April, 1808, the court ordered the property which had been purchased with the above balance to be settled. The order runs thus: "It is ordered and decreed that the said John Mayrant do forthwith execute a settlement, to be dated as of the twenty-sixth day of March, 1794, pursuant to the intent of the court in the said decretal order, that is to say, to and for the separate use and benefit of the said Isabella Mayrant, during her life; and from and after her death, to and for the joint and equal use and benefit of the children of the said Isabella and John Mayrant, equally to be divided among them; that the said settlement do comprehend all the negroes that were purchased under the said decree, with their issue and proceeds, save only those particular

negroes that have, with the assent of the said Isabella Mayrant, been applied to the purchase of the tract of land aforesaid, from John Greening; and as to that land, it is further ordered and decreed that William Mayrant, who petitions as the trustee and next friend of the said Isabella Mayrant, do also execute a declaration of trust, to bear date the first of January, 1795, the time when the negroes were appropriated and the land purchased, to the same uses, intents and purposes before prescribed; and that the master do cause the necessary deeds to be prepared, and that William Mayrant be named a trustee in the settlement."

The necessary deeds were prepared and executed. The settlement of the negroes on the fourteenth of June, 1808, but bearing date on the twenty-sixth of March, 1794; and the declaration of trust of the plantation on the fourteenth of June, 1808, but bearing date on the first of January, 1795. The debt to Mr. James was contracted after the date of the decretal order in March, 1795, and before the order of the fourteenth of June, 1808. He was a factor in Charleston, to whom the crops of the estate were sent, and who used to supply the estate with such articles as Mr. John Mayrant gave orders for from time to time. On a settlement of accounts a balance of four hundred and eighty-three dollars was found to be due to Mr. James, which Mr. John Mayrant, one of the *cestuis que trust* gave his note for, on the twenty-fourth of April, 1813, acknowledging in it that it was for goods for the plantation.

It is contended that the trust is not liable for this debt: 1. Because the trust estate is settled to the separate use of Mrs. Mayrant; 2. Because Mr. John Mayrant had no authority to bind the trust estate. The decretal order of the twenty-eighth of March, 1795, directing the settlement to be made on Mrs. and Mr. Mayrant and their issue, vested in Mr. Mayrant the profits of the estate, during the joint lives of Mrs. Mayrant and himself. In the case of *Barret v. Barret*, 4 Desaus. 448, it is decided that the husband supporting the expenses of the household was entitled to the whole of the profits of the trust estate, settled jointly on himself and his wife. This was a case between husband and wife, and not between them and creditors. Under such a settlement the creditors of the husband would not be allowed to deprive the wife of her maintenance; and the court would apportion the profits to prevent the object of the settlement from being defeated. The court would do so in this case, but that the note was given for things

necessary for the trust estate, and of which it had the benefit. This case falls, then, within the principle of the case of *Carter v. Eveleigh* [*ante*, 596]. Some of the articles for which the note was given, it is said, were not furnished for the trust estate; but upon looking into Mr. James's account a considerable part of it appears to have been furnished for it, which renders a discrimination unnecessary; because Mayrant is himself liable to the extent of his interest in the profits; to subject which to this debt it was necessary to institute a suit in this court, the estate being a trust one, and the profits accruing yearly.

The order of 1808, does not show that Mayrant is not entitled to any part of the profits of the trust estate. It directs a settlement to be made according to the intention of the court in their order of March, 1794, and that the deeds should bear that date. But what did the court intend in the order of March, 1794? That the property should be settled on Mrs. Mayrant, in a manner as should be directed by the court, and the manner was directed by the court, on the twenty-eighth of March, in the year after, viz., on Mrs. Isabella Mayrant, and Captain John Mayrant, and their issue, under the direction of the master. The intention of courts is to be collected from their acts. Now the order of March, 1795, clearly fixes the interests of the *cestui que trust*; and if reference had been had to the proceedings of the court by any person desirous of knowing whether any part of the estate was settled on Mr. Mayrant, he would have seen that he had a life estate in the profits; and that the settlement which was to be made under the direction of the master, did not certainly prevent the act of the court from being complete. It was no longer *sub judice*. The order of 1808, could not impair the rights of those who became creditors of Mr. Mayrant, between that time and the date of the order in March, 1795; for nothing is said in the order of 1808, about the rights of creditors, who were not even before the court, and the court does not decide on the rights of parties not before them. Unless we give to the order of 1808, a construction not affecting the rights of creditors, the order of March, 1795, was calculated to deceive persons the most cautious and wary, and more likely to deceive in proportion to the caution used. As between Mr. Mayrant and his wife, the court could mould and fashion the trusts as they pleased; but those with whom Mr. Mayrant entered into contracts subsequent to the order of March, 1795, and prior to the order of 1808, acquired a general lien on his estate; their

rights are of a more stubborn nature than trusts. They are legal rights and remain unimpaired.

DESAUSSURE and THOMPSON, Chancellors, concurred.

A majority of the court being of opinion that the trust estate of Mr. and Mrs. John Mayrant ought to be subjected to the debt of the complainant, Halloway James.

It is ordered and adjudged that the trustee do account with the complainant, before the commissioner, for the annual income of the trust estate until the debt be paid.

Costs to be paid by the defendants.

WATIES and JAMES, Chancellors, dissented.

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See *Evins v. Smith*, 5 Am. Dec. 557, for a consideration of this subject.

DECISIONS  
OF THE  
COURT OF APPEALS  
OF  
KENTUCKY.

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BRASHEAR *v.* BURTON.

[3 BIRD, 9.]

**VENDOR'S DECLARATIONS AS EVIDENCE.**—The declarations of a party made subsequent to a sale or transfer of property, and which go to take away a vested right, are inadmissible in evidence.

**DETINUE.** The opinion states the case.

By Court, LOGAN, J. This is an action of detinue for a negro that both parties claim under transfers from Mary Caldwell. The appellant claims in virtue of a bill of sale from William Snelling, dated the first of January, 1810; Snelling claimed under a sale from James Caldwell of the same date; and James Caldwell claimed in virtue of a bill of sale from Mary Caldwell, purporting to have been executed on the tenth day of October, 1807.

The appellee who was the plaintiff below, founds his claim upon a bill of sale from William Caldwell, dated the sixteenth of February, 1810, who derived claim from the gift of Mary Caldwell. Upon the trial of the cause the plaintiff, in order to establish his right to the negro offered the declaration of the said Mary, which had been made after the sale and transfer of the negro to James Caldwell, to prove that she had previously given the negro to William Caldwell, and would not have sold him to James Caldwell, only that William was indebted, and his creditors might sell the negro. This evidence was objected to, but the objection was overruled, and the evidence permitted to the jury; which is assigned as one of the errors for a reversal of the cause. Subsequent declarations by a party to a sale or transfer of property, which go to take away a vested right, are

not admissible evidence. This point was decided by this court October term, 1811, in the case of *Bartlett v. Marshall*, 2 Bibb, 468. The same doctrine is laid down in Johnson's Reports, vol. 5, p. 412. To admit such evidence would place in the power of a vendor, who had betrayed a want of correct or honest conduct by creating different claims to the same property, to defeat at will prior purchasers, in favor of another person, without acting under the obligations of an oath, and almost without the possibility of controverting their declarations. Declarations of a right, if in the general true, may be expected within the power of the bargainee or grantee to prove. But if not true how can it be disproved? The evidence ought not to be admitted. With respect to the other points made in the progress of the cause, it seems unnecessary to decide them, because they may not occur again upon another trial of the cause.

Judgment reversed and cause remanded for new proceedings.

See *Drum v. Simpson*, ante, 490.

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## McCOUN v. DELANY.

[3 Buss, 46.]

**"MORE OR LESS" IN DEED.**—The meaning of the term "more or less" in an obligation for a conveyance of land is that the parties are to run the risk of gain or loss in the estimated quantity; but the use of that term does not preclude an inquiry into a fraud which may have been committed by either party.

**DEFICIENCY IN TRACT CONVEYED.**—A deficiency of sixty-seven acres in a tract expressed in the deed to contain six hundred and ten acres, more or less, is not such a deficiency as will entitle the grantee to a rescission of the contract; but where it appears that the deed to the grantor stated the number of acres in the tract to be but five hundred and forty-three, this fact was held to be evidence of the grantor's knowledge of the quantity contained in the tract; and equity will decree the grantor to repay to the grantee the average price per acre for the deficiency.

**BILL in equity.** The opinion states the cases.

By Court, OWSELY, J. The appellee being possessed of a tract of land, on the second day of February, 1803, sold the same to the appellant for the price of four thousand dollars, and gave an obligation conditioned to convey to the appellant by deed of general warranty, the tract of land whereon the appellee then lived, containing six hundred and ten acres on the south side of Kentucky river and forty acres on the north side, and to include

the ferry, be the same more or less. That sometime thereafter the appellant, as he alleges, conceiving himself imposed on in the sale and purchase of the land aforesaid, exhibited his bill in chancery in the Mercer circuit court for relief, in which he charges that the appellant, previous to and at the time of the sale aforesaid, fraudulently represented and assured the appellee that the tract whereon he then lived, and which he was then selling, contained at least six hundred and ten acres on the south side of the Kentucky and forty acres on the north; that, relying on the representations, and believing the tract contained six hundred and ten acres, he made the purchase and received an obligation for a conveyance; that he has made considerable payments therefor, and that there are other adversary claims to the forty acres on the north side of the river; and that under a continued state of misrepresentation and fraud the appellee acknowledged a deed for a certain boundary of land containing by estimation six hundred and ten acres, more or less. He further charges that the tract of land did contain but five hundred and forty-three acres, and prays the contract to be cancelled, etc., and for general relief. The appellee by his answer admits the sale, but denies fraud. On a final hearing the circuit court dismissed the appellant's bill, from which decree he has prosecuted this appeal.

In determining the cause we will first consider whether the appellee, whilst selling of the land, was guilty of such misrepresentation and fraud, for which relief should be extended to the appellant; and if so, whether the subsequent acknowledgment of the deed so changed the case as to preclude the interposition of a court of equity? That the most plain and obvious meaning of the term more or less, in an obligation for a conveyance of land, is that the parties are to run the risk of gain or loss, as there may be an excess or a deficiency in the estimated quantity, is certainly true, as has been heretofore determined by this court: *Young v. Craig*, 2 Bibb, 272. But it is conceived that rule does not preclude an inquiry into a fraud which may have been committed by either party to the contract, and upon the establishment of the fraud relieve against it. It is evident the tract of land upon which the appellee lived, and which he sold to the appellant, on the south side of the river, does not contain the quantity of six hundred and ten acres, but about the quantity of five hundred and forty-three acres. This is satisfactorily demonstrated by the deed from Doran to the appellee filed, as well as from the surveyor's report made out in

this cause. That deed is the only title paper exhibited which establishes any boundary, and from it the quantity is represented to be five hundred and forty-three acres.

But it is urged by the appellee that no defect of title is charged in the bill, and consequently he was not bound to produce one. To this may be answered, that though a defect of title is not alleged, defect of quantity is; and to ascertain the quantity, an examination into the title of the tract which the appellee held at the time of the sale, becomes proper and necessary, for the purpose of describing the boundary. The title from Doran having been produced, and by that the quantity described is found to contain five hundred and forty-three acres only. If the appellee had any other tract or boundary of land, he should have established it; and his not having done so, is a conclusive circumstance that he had no other, and that the quantity was not so great as he represented. That the appellee knew the tract did not contain six hundred and ten acres is equally obvious. He held the land by deed from Doran, and from it he must have known the quantity called for was but five hundred and forty-three acres; and that the quantity sold by the appellee, at the time of sale, was represented as containing at least six hundred and ten acres, from the evidence is abundantly proven. We can have no doubt, therefore, but that the appellee was guilty of a willful, false representation as to the quantity, and for which the appellant is justly entitled to relief. The circumstance of the deed having been acknowledged, cannot affect the appellant's right; for there is no evidence in the cause which proves he had any knowledge of the imposition which had been practiced on him, or that he knew the boundary of the land described in the deed, before it was acknowledged; but it seems from evidence that the appellee had the deed drawn according to courses furnished by himself, and of which the appellant had no knowledge. The acknowledgment of a deed thus made surely cannot better the appellee's situation, or in any wise prejudice the appellant's right.

Upon the whole, we think the appellant entitled to relief; but what should be the extent of that relief admits of more doubt. We are of opinion, however, that the deficiency of quantity is not such as for which the contract should be cancelled, but is properly the subject of compensation: *Finley v. Lynch*, 2 Bibb, 566 [5 Am. Dec. 635].

Decree reversed and cause remanded, and a survey ordered to ascertain the correct quantity of land on the south side of

the river, by metes and bounds, included in the tract conveyed by Doran to Delany, excluding that part conveyed by Delany to Reid; and upon the report of the surveyor a decree be entered in favor of McCoun against Delany for the deficiency between that quantity and six hundred and ten acres, to be computed at the rate of six dollars and fifteen cents per acre, being the average price for the whole quantity purchased by McCoun; and that McCoun be decreed to convey by deed without warranty, the excess which may be included in the deed executed by Delany to him, and which will not be included in the boundary of the tract as before directed to be surveyed.

BOYLE, C. J., absent.

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See *Nelson v. Carrington*, ante, 519.

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## PHILIPS v. MORRISON.

[3 BMS, 105.]

**COVENANTS, WHEN TO BE PERFORMED.**—When no time is fixed for the performance, if the thing to be done is local, the party who has contracted the obligation to perform it will have during his life in which to do it, unless hastened by request; but if it be transitory, he will be bound to perform it in a convenient and reasonable time; and if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract.

**PRESUMPTION OF PERFORMANCE.**—Lapse of time is presumptive evidence of the performance of a covenant to deliver property, as well as of one for the payment of money; and whether the circumstances of the case rebut such presumption, is a question for the determination of the jury.

**COVENANT.** The opinion states the case.

By Court, BOYLE, C. J. On the thirtieth of May, 1784, Philip Philips executed to Isaac Morrison an instrument under seal, whereby he bound himself to procure an assignment to Morrison of one equal fourth part of sixty thousand acres of land warrants, then entered in the name of George Wilson, assignee, etc., on Panther creek, a branch of Green river. Upon this instrument, Daniel Morrison, as executor of Isaac Morrison, on the thirteenth of December, 1809, brought an action of covenant against Michael Campbell, executor of said Philips. Issue was joined on the plea of covenants performed. On the trial of the cause, a bill of exceptions was taken by the defendant in the action, from which it appears that he relied on

the presumption of a performance arising from the lapse of time; that the plaintiff, to repel the presumption, proved by a witness that, about eleven or twelve years after the execution of the instrument, Philips removed from this state, whither he returned in about two years, and died; that the defendant, at his testator's death, resided in this state, and continued to do so until about two years before the trial of the cause; that Isaac Morrison was absent in the state of New Jersey for two years shortly after the execution of the instrument; and the witness also stated that he had been intimate with the plaintiff for ten or eleven years, and never heard him say he had any claim upon the defendant. Upon this testimony, together with the written evidence filed in the cause, the court directed the jury [that such evidence] rebutted the legal presumption that the covenant had been discharged. A verdict and judgment were given for the plaintiff, to which the defendant has prosecuted this writ of error.

Two questions arise in this case: 1. Whether the lapse of time would justify a presumption of the performance of the covenant? And if so; 2. Whether the court erred in directing the jury that the evidence in the cause rebutted the presumption? In support of the negative of the first question, it was contended that there being no time specified for the performance of the covenant, the covenantor, unless hastened by request, had his whole life to perform it; and as twenty years, the length of time in which the presumption of performance would attach, had not elapsed since his death, the presumption could not be justified. This argument cannot be admitted to be correct. Where there is no time fixed for the performance, if the thing to be done be local, the party who has contracted the obligation to perform it, will have during his life to do it in, unless hastened by request; but if it be transitory, he will be bound to perform it in a convenient and reasonable time; and if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract. This distinction is abundantly established by English authorities, and was recognized by this court in the case of *Clay v. Huston*, 1 Bibb, 461. A thing contracted to be done, may be local in its nature, or may be made so by the stipulation of the parties. But the duty which is covenanted to be performed in this case is neither in its nature local (for it might be done any where), nor is it made local by the covenant of the parties. It results, therefore, that the covenantor was bound to proceed immediately to the execu-

tion of the duty which he had covenanted to perform, and to complete the performance of it in a convenient and reasonable time.

But again it is contended that the presumption is applicable only to the case of an obligation for the payment of money, and not to a covenant for the delivery of property, or the performance of other duty. It is believed that the reported cases are generally of the former description; but the principle upon which the presumption is founded applies as strongly, if not more so, to those of the latter kind. Payment of a bond for money after a lapse of twenty years, where there has been no demand on the one side, or acknowledgment on the other, and no circumstance is shown which could have hinted, or impeded the recovery, is presumed, because the existence of the debt under those circumstances, is incompatible with the ordinary motives, and the general course of human conduct. The presumption of payment in such a case, arises, therefore, from what is commonly observed to happen in the transactions between man and man. Now, as a covenant for the payment of property may in general be easily performed by the one party, and in proportion to the value, must be of the same importance to the other, to have it performed, as if it were a bond for the payment of money the lapse of time must afford as strong reason to infer a performance in the one case as it does to infer a payment in the other; and, accordingly, experience, shows that there is as great a degree of punctuality commonly observed in the performance of such a contract, as there is in the payment of a debt due by bond.

We are, therefore, of opinion that the jury might justifiably presume a performance from the lapse of time in this case. As to the second question, the court, we think, had no right to instruct the jury that the evidence, on the part of the defendant, rebutted the presumption arising from the lapse of time. That presumption may, undoubtedly, be repelled by circumstances, and whether the evidence of such circumstances is admissible or not properly belongs to the court to decide; but the jury is the legal and constitutional tribunal to determine the weight of the evidence. The presumption of payment or performance arising from the lapse of time may be stronger or weaker according to the nature of the case; and the jury alone as was decided in the case of *Shields v. Pringle*, 2 Bibb, 387, must judge of the weight of the presumption; and as to the circumstances intended to repel the presumption, may in like manner, according to the

nature of those circumstances, be entitled to more or less weight, by a parity of reason their weight can only be determined by a jury.

The judgment must be reversed with costs, and the cause remanded for new proceedings.

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### BOOKER v. BELL.

[3 Binn, 172.]

**BREACH OF COVENANT OF WARRANTY.**—An action of covenant will lie on the warranty contained in a deed of conveyance of real estate; but to entitle the covenantee to recover on such warranty the plaintiff must prove an eviction by a paramount title.

**EVICITION UNDER JUDGMENT—EVIDENCE.**—An eviction may be with or without the judgment of a court. In the former case, the record is the only evidence of eviction, and whether by default or upon a defense, is immaterial, the record being evidence of the fact of eviction only, not that it was by a paramount title.

**DAMAGES FOR BREACH OF COVENANT OF WARRANTY.**—The measure of damages for the breach of a covenant of warranty in a deed is the consideration paid and interest. That the vendee is not accountable for rent by the statute, is not a cause for exempting the vendor from the interest, but he is entitled to a deduction for the value of improvements on the land at the time of the sale for which the vendee recovered of the evictor.

**COVENANT.** The case appears from the opinion.

By Court, BOYLE, C. J. This was an action of covenant upon general warranty contained in a deed of bargain and sale of land in fee-simple. A breach of the covenant is alleged in an eviction of the bargainee by a superior and adverse title. Issue was joined upon the plea of *non infregit conventionem* and a verdict obtained by the plaintiff under the direction of the court for the amount of the consideration paid, together with interest thereon from the date of the conveyance, and a judgment was thereupon rendered by the court; to reverse which this writ of error is prosecuted.

The first point relied upon for the plaintiff in error, is that an action of covenant would not lie in this case. Where the conveyance was by feoffment with warranty, the ancient and usual remedy in case the feoffee was evicted, was by voucher or *warrantia chartæ*. Whether in such case an action of covenant would not also lie, is not very clearly settled in the English books, so far as we have had an opportunity of examining them. It is, however, said to be the better opinion that it would not. But, be that as it may, it does not necessarily follow that the

same doctrine will hold good with regard to a warranty contained in a deed of bargain and sale, or other deed operating under the statute of uses. It is evident that prior to that statute, if any action would lie for a breach of the covenant of warranty contained in such a deed, it must have been an action of covenant. It could then have been but a personal covenant, and ought, we apprehend, to be still so considered. But there are other considerations which we think are entitled to greater weight upon this point. The covenant of warranty has ever since, and long before the establishment of this commonwealth, been uniformly treated as a personal covenant, upon which the action of covenant would lie. The invariable practice for so many years in a case where the balance hangs so nearly in *equilibrio*, ought to turn the scale in favor of the action; more especially as the remedy by voucher is taken away by statute and the writ of *warrantia chartarum* has become obsolete by disuse.

To these considerations we may add that in the supreme court of Massachusetts, the only American court, so far as we are aware, in which this question has been decided, it was held upon the score of the usage of the country that a warranty was personal covenant, and that the remedy by action of covenant was proper: 1 Mass. 544. That case, though not authority, is entitled to respect, and tends to fortify the conclusion which, upon principle, we deem correct.

The second point relied upon for the plaintiff in error is, that the judgment of eviction having been obtained by default, is not sufficient to warrant a recovery in this case. To obviate this objection, the defendants in error alleged that the plaintiff's intestate had notice of the pendency of the suit in which the judgment of eviction had been obtained; and to establish that fact, proved by a witness that he had heard the plaintiff's intestate say that he had been at Lexington, and had intended to employ an attorney to defend the action; but the witness did not know, nor did he hear him say, whether he had in fact employed one, nor whether it was before entering judgment or not. The counsel for the plaintiff in error then moved the court to instruct the jury that notice from the purchaser to the seller, of the pendency of the suit in which the eviction was had, would not exonerate the former from his obligation to defend the suit; and that if any notice would so exonerate him, it should be a direct notice from him containing a requisition to the latter to appear and defend the suit. But the court instructed the jury that information from any source, and with-

out such requisition, would make it so incumbent upon the latter to defend the suit, that the want of defense by the former would not prejudice his right to a recovery. Neither the instruction which was asked, nor that which was given by the court, seems material in this case.

To obtain a recovery in a case of this kind, two points are necessary to be established: 1. That there was an eviction; and 2. That the eviction was legal, and had by virtue of a paramount title not derived from the bargainee. An eviction may be either with or without the judgment of a court. In the latter case, as there is no record or written evidence of the transaction, it would be absurd to require any other than parol proof of the fact of eviction; but in the former case, the record itself would be the only proper evidence of an eviction; and of that fact it would be in the same degree evidence whether the judgment was obtained after defense made or without defense.

But with respect to the title under which the eviction was had, the record would not be evidence against the vendor, whether the judgment was obtained after defense made by the vendee or not; first, because the vendor, not being a party to the record, could not be bound thereby; and secondly, because the judgment might have been obtained under a title derived from the vendee after his purchase, against which no defense could have availed. As, therefore, the record of the proceedings is in the same degree evidence of the fact of eviction, whether there was a defense made by the vendee or not, and in neither case can be evidence against the vendor of the other point necessary to be established, namely, that the eviction was had by virtue of a paramount title not derived from the vendee, it is plain that neither the instruction asked, nor that which was given, was in the slightest degree material. Whether notice of the pendency of the suit in which the eviction was obtained, and the failure to make a defense on the part of the vendor, ought to have been received as circumstantial evidence that the judgment of eviction was obtained by virtue of a superior title, is a point which does not seem to have been made in the court below; nor do we think it material now to be decided, since we are of opinion that the other evidence exhibited by the record of the superiority of the title under which the recovery was had, to the competency of which there was no objection, was sufficient to justify a verdict for the defendants in error.

The third ground relied upon for the plaintiff in error is, that the court erred in directing the jury that the consideration paid,

with interest thereon from the date of the deed of conveyance, was the proper criterion of damages. It appears from the evidence spread upon the record in this case, that at the time of the sale by the intestate of the plaintiff in error to the defendant's testator, there was a farm on the tract sold; that the latter continued in the possession of the land, without paying rent therefor, until the commencement of the suit in which the judgment of eviction was had; that when the judgment was obtained commissioners were appointed, under the occupying-claimant law, to assess the value of improvements, etc., and that the commissioners having reported a considerable sum due as the value of the improvements, after deducting the rent from the commencement of the suit, a judgment therefor was given in favor of the defendant's testator against the successful claimant.

Under these circumstances, it is contended: 1. That interest on the consideration paid should not have been recovered by the defendants for the time their testator enjoyed the land without being subject to rent; and, 2. That the value of the improvements on the land at the time of the sale should have been deducted from the amount to be recovered. The criterion of damages adopted in this case is that which had been established by this court in the case of *Strode v. Cox*, upon the authority of which many subsequent cases have been decided. That there should be some rule upon this subject is manifest, and we know of none less liable to objection or better calculated to attain the ends of justice than the one which has been established. The principle upon which the rule is founded is, that the purchase-money and interest is the actual gain made by the one and the actual loss sustained by the other, whereas if the amount to be recovered was to be more or less, according to the rise or the depression of the price of lands, the inevitable result would be to enrich the one to the prejudice of the other, contrary to the maxim both of the civil and common law, that *nemo debet locupletari aliena jactura*. The rule, however, is but a general one, and ought not to be applied to a case not coming within the principle upon which it is founded. In the case of *Cox v. Strode* [5 Am. Dec. 603], and the cases subsequent to it, the circumstances upon which the objections to the application of the rule to this case is bottomed, did not occur. How far those circumstances ought to have the effect contended for, is the material inquiry.

With respect to the objection founded upon the exemption of the vendee from the payment of rent to the successful

claimant, it does not appear to be sustainable; this is an advantage conferred by the occupying-claimant law upon the vendee as the occupant of the land; but it is not taken from the vendor, but from the successful claimant, who, were it not for the positive provisions of that law, would be entitled to the rents as a remuneration for the use of his property. Though the vendee, therefore, may be said to be a gainer, the vendor is not a loser, nor can he have a right to complain.

The objection founded upon the circumstance with respect to the value of the improvement upon the land at the time of sale, and for which the vendee recovered a compensation from the successful claimant, is entitled to more weight. The *bona fide* possessor is in justice entitled to a remuneration for the improvements he makes, and the law secures it to him or to those who represent him. The vendor having bestowed his money in meliorating the land, and the vendee having received a compensation therefore from the successful claimant, it is clear that the vendor would be a loser, and the vendee a gainer, to the amount of the value of those improvements, if it were not to be deducted from the amount to be recovered in this case. This would be enriching the one to the prejudice of the other, and so far directly opposed to the principle upon which the general rule for the measure of damages in cases of this kind is founded.

We are therefore of opinion that the plaintiff in error is entitled to a deduction of the value of the improvements on the land sold at the time of sale, and for which the vendee has received a compensation from the amount of the purchase-money and interest, and that the court erred in instructing the jury otherwise.

Judgment reversed with costs, and cause remanded for a new trial.

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As to the measure of damages on a breach of the covenant of warranty, see *Gore v. Brasier*, 3 Am. Dec. 182; and note to *Horsford v. Wright*, 1 Id. 8; and *Henning v. Withers*, ante, 589. As to the necessity of showing an eviction by a paramount title, also see *Emerson v. Proprietors*, 2 Id. 34. In *Hamilton v. Cutts*, 3 Id. 222, and note, it is shown that a person may recover on a covenant of warranty, when he yields the possession to one having a paramount title, and that a judgment of eviction is not necessary.

## GIVENS v. BRADLEY.

[3 BIRK, 192.]

**PROSECUTION OF ONE OR MORE DEFENDANTS IN TORT.**—In trespass against several defendants, the plaintiff may proceed to trial, as to one or more, without entering a *nolle prosequi* as to the defendants who have not been served with process, and who have not appeared.

**EVIDENCE OF GENERAL CHARACTER.**—In an action of trespass for an assault and battery, the plaintiff ought not to be permitted to give evidence of his general character.

**ASSAULT and battery.** The case appears from the opinion.

By Court, OWSLEY, J. This was an action of assault and battery, brought in the Livingston circuit court, by Bradley against the plaintiffs in error and James Cary, William Love and Joshua Cary. The *capias* was executed on the plaintiffs in error, and bail taken according to the order of a judge. The writ was afterwards, together with the two bail bonds, deposited by the clerk of Livingston with the clerk of Logan, and by him the cause was placed on the issue docket, at the July term, 1810, at which term the court, on the motion of the plaintiffs in error, caused the case to be stricken from the docket and ordered it to be remanded to the Livingston court, because neither the original order of the judge for a change of venue, nor a copy thereof was filed with the clerk of Logan. At a subsequent day of the same term, on the production of a certified transcript of the proceedings at the Livingston circuit court, together with the order for the change of venue, the court reinstated the cause upon the docket, and continued it until the next term. At the October term, the plaintiffs in error again moved the court to strike the cause from the docket, because at the preceding term it had been stricken from the docket and remanded to the Livingston circuit court; the court, however, overruled the motion. The plaintiffs in error then filed their plea of not guilty, but objected to going to trial, unless the plaintiff in that court would enter a *nolle prosequi* as to the other defendants, until the cause should be prepared for trial as to them. The court overruled the objection and ordered a trial on the issue joined.

In the progress of the cause, the defendants below offered to prove that a quarrel had taken place on the same day, though at a different place to that where the battery, for which the suit was brought against them happened, between one of them and plaintiff in that court, at which time the then plaintiff cut the hand of one of the defendants, and that before the blood

had time to cool, the battery, for which this action was brought happened. The admission of this evidence was opposed by the plaintiff below and rejected by the court. The plaintiff below (now defendant in error) likewise offered evidence of his good general character as an honest, peaceable, orderly member of society, which was objected to by the plaintiffs in error, but the objection was overruled and the evidence admitted. Verdict and judgment were obtained against the plaintiffs in error, from which they have prosecuted this writ of error.

That the court below decided correctly in refusing at the October term to strike the cause from the docket, we have no doubt. The circumstance of the cause having been struck from the docket at the July term when there was nothing before court showing a change of the venue according to law, surely could furnish no cause for again remanding the cause, when it was then apparent the venue had been regularly changed to that court. The order of the judge was regularly obtained and deposited with the clerk of Livingston, ordering a change of venue to the Logan circuit court; and though the Logan court might have acted correctly in the absence of that order or a certified copy, in striking the cause from the docket in the first instance, they surely had the right, and properly exercised it, on a subsequent day of the same term, in reinstating the cause on the docket, upon the production of the proper papers to the court; and, consequently, decided correctly in refusing at their next term to strike the cause from the docket.

The next question presented for consideration is, should the plaintiff in the court below have been permitted to go to trial as to the plaintiffs in error, without previously having entered a *nolle prosequi* as to the other defendants, or preparing the cause for trial as to them? We know of no principle of law prohibiting a plaintiff, in actions of this description, from going to trial as to part of the defendants, without first disposing of the cause as to the others. It is evidently not necessary that the same jury should try all the issues which may be joined on the various pleas of different defendants; and if different trials may be had on different issues, no reason can be perceived why the plaintiff in such a case should be bound to prepare the cause for trial as to all the defendants before a trial is had on the issue joined by others.

The next question presented by the assignment of errors is, should the plaintiffs in error have been permitted to prove the circumstances of the previous quarrel, as a provocation to that

for which this suit was brought? It is deemed unnecessary to decide whether the court erred in the first instance, in rejecting the admission of such evidence, for if it were an error to exclude the evidence, although the court was of opinion it was inadmissible, the plaintiff in that court waived his objection to its admission, the evidence was heard and the jury informed by the court that the evidence by the act of the plaintiff was made legal, and they were to consider it accordingly.

The opinion of the court, therefore, as to the inadmissibility of the evidence under the circumstances of this cause, can have produced no injury to the plaintiffs in error, and consequently for that cause the judgment should be reversed. It is, however, objected that it does not appear in the bill of exceptions taken to the opinion of the court as to the inadmissibility of the evidence, that the objection was waived and the evidence heard; but that the fact is ascertained by a statement made by the court at a subsequent day of the term, not in the presence of the parties, and which, it is contended, should not be considered as a part of the record binding on the parties. That the court had the power, during the term, to correct any error or supply any omission which might have taken place in preparing the bill of exceptions, there can be no doubt. It cannot be supposed that the power of the court over bills of exceptions absolutely ceases upon their signing them; and if it does not, the only limitation in point of time for the exercise of that power, must be at the end of the term at which exceptions may be filed. The court, then, having the power to correct or amend statements made in a bill of exceptions, the statement made by the court in this cause should be taken as a part of the record, and conclusive as to the admission of the evidence which was previously opposed.

It remains only to determine whether the court erred in admitting the plaintiff in that court to prove he was a man of good general character? From every research which we have been enabled to make, no case has been found where this point has undergone a direct adjudication. It seems, however, to be a rule of evidence well settled, that the evidence must be applied to the particular fact in dispute; and in *Peake's Law of Evidence*, p. 6, it is said that the character of neither party to a civil cause shall be called in question, unless put in issue by the very proceeding itself. In prosecutions for criminal offenses which subject the offender to corporeal punishment, the general character of the accused cannot be inquired into

unless he should first call evidence in support of his character. But the admission of such evidence seems to be confined to those criminal cases only which subject the offender to corporeal punishment, and is not admitted in actions or informations for penalties, though founded on the fraudulent conduct of the defendant: Peake's Ev. 8. In actions, such as for slander, where the injury complained of has been sustained by the character, this court has hitherto adjudged it competent for the plaintiff to prove his general character; but in cases like the present, to permit the plaintiff to go into an inquiry as to his general character, when his character is in no wise involved in the issue, nor affected by the injury complained of, would be a violation of the general rules of evidence, and evidently improper. The court below, therefore, erred in permitting the inquiry.

The judgment must, therefore, be reversed, with costs, and the cause remanded for further proceedings consistent with this opinion.

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### COLEMAN v. HUTCHENSON.

[3 Binn, 309.]

**WEEK LEGACY DOES NOT LAPSE.**—A husband bequeathed certain slaves to his wife for life, and after her death to his nephews; it was held that, by the death of one of the nephews in the life-time of the wife, his legacy did not lapse, but descended to his heir at law.

**TIME RUNNING AGAINST TENANT IN COMMON.**—The possession of one tenant in common is the possession of the other, and the statute of limitations runs only against an adverse possession of the entire and undivided property, from the time of the actual ouster and adverse holding.

**BILL in equity.** The opinion states the case.

By Court, LOGAN, J. The appellee exhibited his bill to recover a residuary interest under the will of John Hutchenson the elder. He claims as heir at law to William Hutchenson, his brother; and the appellant derives title under a purchase from the father of William, who was one of the executors of John Hutchenson, the testator, upon the following case: In the year 1774 John Hutchenson devised to his wife for life all his estate, and after her death over to his nephews, Robert, Charles and William Hutchenson. William died intestate during the life of the widow, in the year 1784, leaving the appellee his eldest brother and heir at law. And the appellant having purchased the interest of the legatees, Robert and Charles, obtained

possession of the slaves devised in the life of the testator's widow; and in the year 1799, after the death of the widow, purchased from the father of William Hutchenson all his right, title and claim derived under the devise to his son William. In virtue of this purchase, and the appellant's length of possession, he sets up claim to the slaves in contest. In the year 1800 he removed to this state, and settled in the neighborhood of the appellee and his father, who had resided in the country since the year 1788. And it was not until the year 180—, and after the death of John Hutchenson, the father, that the appellee, his son, commenced this suit; in which he obtained a decree for one third of the value of two slaves decreed to be sold as indivisible according to that proportion, together with damages for his share of their heirage since the death of the widow. From which decree Coleman has appealed to this court.

The first point we shall notice in the investigation of this cause, is the effect of the purchase from the father, one of the executors of the testator, for it cannot be controverted that the brother, and not the father, was the heir at law under the laws of Virginia in the year 1784. The doctrine is too well settled to be now questioned, that a *bona fide* purchase from an executor of a slave, over which his power as executor continues, is conclusive against heirs and legatees. But this principle cannot be extended to protect sales made in the private right, and not in the fiduciary character of the seller. The sale, in the present instance, was obviously of a supposed right in the seller as heir at law to his son, and not as an executor. The writing between the parties purports to be a mere relinquishment of the right, title and claim of the vendor in the property devised to his son. Whereas, if it had been a sale by him as executor, it is presumable that it would have purported to be a transfer of property belonging to the estate of the testator, and not merely of the right of a legatee or one claiming under him. Besides, in this case long and uninterrupted possession of the slaves devised, is satisfactory to prove the consent of the executors to the payment of the legacy; and therefore, their power over the slaves, thus given up in satisfaction of the legacy, ceased. It was urged, in opposition to the appellee's right of recovery, that the legacy of William Hutchenson never vested, but lapsed upon his death in the life of the widow; and that therefore the estate did not descend to his heir at law. The law, however, is clear that the legacy vested upon the death of the testator, though subject to the life estate of the widow: See Bac. Abr. 394, 395, tit. Legacy.

The appellee then having shown an interest in the property in contest, it remains in the next place to inquire whether the law has given a remedy for its recovery. The legatees under the will of John Hutchenson held as tenants in common; and when Coleman, the appellant, became vested with the interest of two of them, he held in that proportion in common with the third or his legal representative. Tenants in common were not compellable by the common law to make partition, each was interested according to his share in every part of the entire thing. And by the rules of equity the same doctrine prevailed, for *equitas sequitur legem*. Equity does not intermeddle with and control the maxims of law; it subserves the purposes of law, by giving relief in certain cases where the law has created the right. But by an act of the legislature of Virginia, passed in 1705 (see the old body of the Virginia laws, page 23), it is provided that, "where the nature of the case shall require it, any writ *de partitione facienda*, or of dower, may be sued forth and prosecuted to recover the right and possession of any such slave or slaves." And by an act of 1784, same book, 166, actions of account may be brought and "maintained by one joint tenant or tenant in common against the other, as his bailiff for receiving more than comes to his just share or proportion." It is believed that both these acts are still in force. The former gives the right of partition by the writ *de partitione facienda*, and the latter the right to recover by an action of account the just share or proportion of the profits. In both these modes of recovery, courts of equity have long exercised concurrent jurisdiction with courts of law: 1 Fonb. 15-18, and the authorities there cited. But in the exercise of this jurisdiction equity must so mould her decrees as to effect the same end, and advance and secure the right which had been created by law. The manner of doing this is peculiar to the power of courts of equity; but the thing to be effected is the right given by law.

In the present case, then, the right of partition, and to recover the just proportion of the hireage, having been given by law, by the writ *de partitione facienda*, and the action of account, in either of which modes of recovery, courts of equity have long exercised concurrent jurisdiction with courts of law, the court therefore has properly taken jurisdiction of the case, if not barred by the statute of limitations. This leads us to an examination of the question, whether the statute of limitations will bar the appellee's right of recovery.

As by the common law tenants in common were not compel-

lable to make partition, so by the statute they are not restricted to any time to commence their action for partition. They may continue to hold as tenants in common until it is the will of either to produce a severance. In legal estimation the possession of the one is the possession of the other tenants in common. And the statute of limitations runs only against an adverse possession of the entire and undivided property, and not against a right existing in trust with the possession. Hence it follows that the statute does not run in favor of one against another tenant in common. If, however, there had been an actual ouster and adverse holding, the statute of limitations will run from the time of such ouster and adverse possession.

Here the inquiry would arise, whether in this case there was such an ouster and adverse holding as to justify the running of the statute of limitations, but for the statute which gives the right of partition. By this statute, the remedy is given to recover the right and possession of any such slave. The expression is general, and seems as applicable to cases where there has been an actual ouster and adverse holder as to any other case. And the time of doing it, as was before observed, is unlimited by the statute. By the principles of the common law, it is believed that the appellee could not have recovered against the appellant, because of the cotenancy existing between them in legal contemplation; for, if he had sued either at law or in equity for a partition, the appellant might have defeated the action, on the ground of their holding as tenants in common, even at the time this suit was brought; although, on the other hand, an adverse possession is now relied on to justify the running of the statute in bar of the appellee's right to recover. But without dwelling further on this branch of the subject, it seems sufficient to observe that while the parties held, as tenants in common, the statute authorized a recovery by one against the other, without limitation as to the time of suing. And since there has been no change either in law or in the situation of the parties, except that produced by the party himself, through his purchase, without the consent, or perhaps even the knowledge of his cotenant, certainly the course of the law is not diverted, to the overthrow of an existing right, for the recovery of which a remedy had been provided, without restriction or limitation as to time.

We shall now proceed to consider whether the decree, as rendered in this cause, is correct. Some doubt has been entertained whether a court of chancery, having jurisdiction and pos-

session of the case, might not, consistent with its character and its duty, pronounce such decree between the parties as would seem most to conduce to the interest of both, and the quiet and good order of society. This, it was confidently believed, would be most likely secured by such decree as was given by the court below in the sale of the two slaves, they being indivisible according to the rights and interest of the parties. But, on a further examination of the subject, we are all of opinion that the decree must be reversed on this ground. We have been able to find no case where a sale of the property has been adjudged or decreed under the doctrine of partitions at law or in equity.

It is by statute that the right of partition in this case is given. The statute prescribes the extent of the partition by the remedy it affords. This may be effected either by a court of equity or by a court of law; but the result in both courts must conform to the law. Now the extent of partitions by the writ *de partitione facienda*, is known in law not to oust or deprive a party of his entire interest in the property itself, as might be the case by the sale of it; but to effect a just division of it, or of the profits when the thing itself cannot be divided. By the statute 31, Henry VIII. joint tenants and tenants in common might be compelled to make partition of lands, etc., by writ of *de partitione facienda*, in like manner and form as coparceners by the common law were. By the common law, parceners might be compelled to make partition between them by the writ *de partitione facienda*. And with regard to the manner of making partition, it is laid down that if the thing be indivisible, that one may have it for a day, a week, etc., and the other another day or week, etc. See Co. Lit. 164; 5 Bac. Ab. In those authorities it is said that "if a villein descend to two coparceners, this is an entire inheritance; and albeit the villein himself cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one week, etc., and the other another day or week, etc. And for the same reason a woman shall be endowed of a villein:" Co. Lit. 31 a. And so it is with respect to absolute or real estate: Co. Lit. 125.

Whatever may be the consequence resulting from an alternate holding between tenants in common, of such slaves as cannot be divided, it is the effect of the law, the legislature not having vested the courts with the power to decree a sale of slaves. The court below should, therefore, have decreed to each party the possession of the two slaves from time to time, according to their respective proportions. But it is also the

opinion of this court that the court below ought to have decreed in damages for the hireage and use of the two slaves, only for five years next preceding the commencement of the complainant's suit, and not from the death of the widow; which happened many years before that period; because the statute of limitations in actions of account applies in bar of an earlier recovery.

Wherefore it is decreed and ordered, that the decree of the circuit court be reversed and set aside; that the cause be remanded to said court, that a decree may be entered agreeable to the foregoing opinion, and such other orders and decrees made therein as shall seem necessary and agreeable to equity.

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### CLAY v. FRY.

[3 Binn, 248.]

**RELIEF AGAINST JUDGMENT AT LAW.**—Equity will grant relief against a judgment at law for money won at gaming, where the judgment was by default.

**SAME.**—If the defense is purely legal, a party failing to avail himself of it in a court of law will not be permitted to resort to a court of equity for relief; but if it be of such a nature that the party may avail himself of it either at law or in equity, relief may be granted, although the defense might have been made at law.

**BILL** in equity. The opinion states the case.

By Court, **BOYLE**, C. J. This was a bill with injunction to stay proceedings upon a judgment at law, obtained without defense upon a note alleged in the bill to be given for money won at gaming. Upon a general demurrer to the bill, the court below decreed the injunction to be made perpetual, from which decree this appeal is prosecuted. The question is, whether a court of equity is competent to relieve against the judgment in this case. By the act of 1798, all promises, agreements, notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, where the whole or any part of the consideration is money or other valuable thing won at gaming, is declared to be utterly void. This provision is taken from an act of the Virginia assembly of 1779, and is similar to the provision contained in the English statute upon the same subject. The decisions, therefore, of the courts of England and Virginia will be entitled to influence in this case.

Contracts for a gaming consideration were not deemed void at

common law, nor are we aware of any case prior to the statutory provisions for restraining the practice of gaming in which a court of equity has relieved against a contract or security for money won at play, divested of all other circumstances. But courts of equity had manifested a strong inclination against such contracts or securities by seizing upon slight circumstances to invalidate them, and since they have been declared void by statute, though a good defense is thereby afforded at law, courts of chancery have interposed and relieved against them, merely on the ground of the illegality of their consideration. The case of *Kowden v. Shadwell*, Amb. 269, is a strong example of this kind. There the chancellor not only ordered the bond, which had been given some time after the money had been won, to be delivered up, but decreed the money which had been paid in part discharge of it to be refunded. The general principle, and a reference to other cases in illustration of it, will be found in Newland on Contracts, 492. The same doctrine was recognized by the court of appeals of Virginia in the case of *Woodson v. Barrell*, 2 Hen. & M. 80 [3 Am. Dec. 612], and was adopted and sanctioned by this court in the case of *Davidson v. Givins*, 2 Bibb, 200 [4 Am. Dec. 695].

But it is contended in this case that the party might have defended himself at law, and not having done so, he is precluded from resorting to a court of equity for relief. Where matter of defense is purely legal, and exclusively cognizable in a court of law, it is clear if a party fails or neglects to avail himself of it at law he cannot be permitted to resort to a court of equity. But if the defense be, as it is apparent it is in this instance, of such a nature that the party may avail himself of it either at law or in chancery, although he should fail to take advantage of it at law, he may nevertheless, according to the repeated decisions of this court, resort to a court of equity for relief, in the same manner and for the same reason that a party having a claim of which a court of law and a court of equity have concurrent jurisdiction may elect to which tribunal he will apply to enforce his claim.

We are, therefore, of opinion that the decree of the inferior court is correct and must be affirmed with costs.

## KELLY v. BRADFORD.

[3 BIRD, 317.]

**BOND FOR INDEFEASIBLE TITLE.**—A bond to “make an indefeasible title in fee-simple, such as the state makes,” demands a deed with general warranty; and under such obligation the court will not compel the vendee to accept a title that is doubtful.

**SPECIFIC PERFORMANCE—COMPENSATION IN DAMAGES.**—Upon a bill for a specific performance of a contract for the conveyance of land, if the vendor's title is doubtful to a part, the court will not compel him to give land out of the same survey, to which his title is clear, in lieu of the land sold, but will give compensation in damages for that portion to which the title is doubtful; and the vendor having acted in good faith, the measure of compensation is the price paid and interest.

**WRITING IMPLIES CONSIDERATION.**—A valuable consideration is necessarily implied from an obligation in writing, although none is therein expressed.

**GENERAL EXPRESSIONS, OPERATION OF.**—The operation of general expressions in an obligation cannot be restrained by parol proof of the understanding of the parties.

**CROSS-APPEALS.** The facts appear from the opinion.

By Court, OWSEY, J. In the year 1780, Samuel Bryant having a commissioner's certificate for a pre-emption of one thousand acres of land, to lie about three miles from Bryant's station, assigned the same to John Bradford, for which Bradford executed his bond to Bryant, for a conveyance of part thereof when a title should be procured.

After this Bryant sold to Samuel Kelly five hundred acres, part of the aforesaid tract; but not being entitled to that quantity, under his contract with Bradford, gave him other lands for the deficiency, and Bradford then gave his obligation to Kelly, under the penalty of five thousand pounds, conditioned “as soon as possible to make or cause to be made a sure and indefeasible right and title, such as the state makes, in and to five hundred acres of land in fee-simple, to lie on the north branch of the north fork of Elkhorn, with a spring on it, and the creek running through it,” etc. Kelly sometime thereafter took possession of the land and died, leaving the complainants in the court below his heirs and representatives. To obtain a conveyance for the quantity of land contained in Bradford's bond, they exhibit their bill in equity. They charge that Bradford, a number of years ago, laid off the five hundred acres to their deceased father, upon which he settled, but that he so laid it off as to comprehend within its boundary upwards of one hundred acres which are covered by a military claim,

owned by Benjamin Howard, and which they understand and are advised is superior to the claim of Bradford; that they are uninformed whether the land as actually laid off contains the full quantity of five hundred acres; that Bradford had in the tract of one thousand acres more land clear of dispute than was necessary to satisfy his bond, and still owns a sufficiency, or nearly so, to make up the deficiency occasioned by the interference with Howard. They prayed for a conveyance by a deed with a clause of general warranty to the full quantity of five hundred acres, clear of dispute, and general relief, etc.

Bradford by his answer admits he obtained the assignment of the pre-emption certificate from Samuel Bryant, for which he gave his obligation to Bryant for three hundred acres of land, part thereof; that Bryant afterwards sold to Samuel Kelly five hundred acres, part of said tract, and agreed to exchange with him Bradford, two hundred acres elsewhere, to make up Kelly's quantity; and that at Kelly's request he did, in August, 1780, execute the bond upon which this suit is founded; but he avers that it was not the understanding of him, Bryant, or Kelly that a general warranty deed should be made, but only such a title as he should receive from the state. He admits Kelly settled on the land sold to him, and which was laid off to him at his request; but he does not admit Howard's claim interferes with that laid off to Kelly, and if it does, he denies its superiority. He refers for the true quantity to the certificate of the deputy surveyor by whom the land was laid off to Kelly; he admits that he refused to convey the land by a deed of general warranty, but avers he did prepare and has acknowledged in the clerk's office of the proper county, a deed with a clause of special warranty, to the complainants for the land laid off to Kelly, and that he is willing to make further or other conveyance, according to the terms of his contract.

The court below, considering the interference with Howard's claim sufficiently established, and being of opinion it is superior to Bradford's, for so much as is claimed by Howard, decreed Bradford to convey on the other end of his tract of one thousand acres, and also decreed him to convey the balance of the survey made for Kelly after excluding that part claimed by Howard; the conveyance to be made by a deed of special warranty. From this decree both parties have appealed to this court.

As this is a suit brought against Bradford for the specific execution of a contract, it seems proper that we should in the first

place determine upon the construction and efficacy of the obligation by which that contract is evidenced, whether Bradford is bound to convey by a deed with a clause of general or special warranty.

Whatever might have been our opinions, were this a case of the first impression, we feel ourselves constrained by the authority of the case of *Cowan v. White*, in this court, Sneed, 177, to declare that a general, and not a special warranty is required by the bond. In all cases, and especially those by which the titles to real property are involved, it is highly important, for the peace and quiet of the community, that uniformity of decisions in this court should be preserved and maintained as practicable. The case of *Cowan v. White* has long since been published, and the principles there recognized generally known and understood; and as it was the decision of the court of ultimate and final determination in this country, many may have made contracts under impressions that it contained a correct expression of the law by which their contracts would be expounded. The recognition of a different rule at this day might, therefore, tend to overreach contracts made in faith of that decision, and subject parties to greater liabilities than they themselves intended. We feel ourselves bound, therefore, to adhere to the principles adopted in that case.

But it was contended in argument that the present is unlike that case, because the bond of Bradford does not express to have been given for value received; whereas the obligation in the case of *Cowan v. White*, contained such expressions. That circumstance, we apprehend, should not, however, produce any effect on the construction of the bond; for although the bond does not so express it, yet by necessary implication and intentment a valuable consideration is implied. But it was again contended, a general warranty deed should not be decreed, because, from the nature of the contract between Bradford and Bryant, such could not have been the intent of the parties; and because, too, the evidence in the case clearly shows that such a deed was not to be required.

What would have been the effect of the obligation first given by Bradford to Bryant, in a contest with them, we deem unnecessary in this case to determine, because we are of opinion the evidence clearly proves a valuable consideration passing from Kelly to Bryant for the land, and the execution of the bond in question in consequence of Kelly's discharging Bryant from his liability. The case to Kelly, therefore, stands as upon

a valuable consideration, and must be so taken in the decision of this contest. If, then, Bradford's bond, by its terms, imports an obligation for a general warranty deed, that implication cannot be repelled by the production of parol evidence of what was the understanding of the parties, for it is clear the operation of general expressions in an obligation cannot be restrained by parol evidence: See Sug. Vend. 117, and the authorities there cited.

As Bradford's bond, therefore, imposes upon him an obligation to make a general warranty deed, it becomes necessary in the next place to inquire what decree the complainants in the court below have shown themselves entitled to. From the description contained in the bond, and various other circumstances detailed in evidence, we have no doubt but the land intended by the parties lies in the north end of Bradford's tract of one thousand acres, and is comprehended in the boundary of the deed referred to by Bradford in his answer. To so much therefore of that boundary as Bradford has shown a good and indefeasible title, he should be compelled to convey by deed of general warranty. But it is contended for the heirs of Kelly, that they should not be compelled to take a title to that part of the land claimed by Howard, because they allege his claim is superior to Bradford's. We deem it unimportant in this case to decide on the relative dignity or superiority of those claims, because to make the best of the case of Bradford, his right to that part of the land is extremely doubtful, and in a suit for the specific execution of his contract, equity will not compel the purchaser to take such a title. Nor should the circumstance of Kelly many years ago taking possession of that part of the land under Bradford, and afterwards surrendering that possession affect his case, for as Bradford held the legal title, and was bound to Kelly for a title to enable him to comply with his obligation, he should have investigated and settled the title.

The heirs of Kelly should not therefore be compelled to take a title to the land claimed by Howard. But as that part of the land constitutes part of Kelly's purchase, we have no doubt but that the court below erred in decreeing Bradford to make up that quantity by conveying other land in a different part of his tract; for that would be making Bradford convey land he never sold; and although equity may compel the execution of contracts, it cannot make for the parties a new contract. So much of the decree, therefore, as requires Bradford to convey land in the south end of his tract, is clearly erroneous.

But as Kelly's heirs cannot be compelled to take the land claimed by Howard, the question occurs, what is the measure of compensation to which they are entitled? It is satisfactorily proven that when Bradford gave his obligation, he then believed the land now claimed by Howard belonged to him; he should, therefore, in the decision of this case, be considered in the attitude of an honest seller of that to which he conceived he had title. And in such case it has been repeatedly held, and is now the settled rule of the court, that the value of the land when the contract was made, with interest, forms the rule for compensation. The value should, however, we apprehend, in the present case, be ascertained, if practicable, by the price given by Kelly for the land; for as it is the consideration passing from Kelly that fixes the liability of Bradford, the same principle should regulate the measure of compensation.

The decree of the court below must therefore be reversed; the cause remanded to that court, and a decree there entered conformable to this opinion; and such further orders and decrees there made as may be necessary to carry into effect the principles herein recognized. Each party must pay his own costs in this court.

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### PEEBLES v. STEPHENS.

[3 BERR, 324.]

**SUPPRESSIO VERI GROUND FOR RESCISSION.**—A contract for the sale and purchase of land will be rescinded where the vendor fails to disclose that the land was covered by two adverse claims and elder patents.

**APPEAL** from a decree dismissing Peebles's bill. The opinion states the case.

By Court, **BOYLE, C. J.** Calk sold to Poage two hundred and ninety acres of land, for which he gave his bonds, conditioned to convey, with a covenant to refund, at the rate of two dollars per acre, if the whole or any part of the land should be lost. Stephens, having purchased from Poage and taken an assignment of Calk's bond without recourse to Poage, sold to Peebles and assigned to him the bonds upon Calk, for which Peebles agreed to give one thousand pounds; four hundred pounds of which he paid and executed his obligation for the payment of the balance in one and two years. Upon these obligations Stephens brought suits and recovered judgments at law; to stay proceedings upon which, Peebles filed this bill. He al-

leges that Stephens fraudulently represented the land to be clear of dispute, except in a small part by a claim of very inferior dignity, when in fact he well knew that there were several other interferences with elder patents, which covered the whole or the greater part of the land. He prays for a rescission of the contract, a repayment of the amount advanced by him, and an injunction to stay proceedings upon the judgment at law. Stephens, in his answer, admits in substance the terms of the contract as stated in the bill, but insists that the contract on his part was fair and without fraud, and denies that he knew of any interference except with the claim of which he informed Peebles prior to his purchase. Upon a final hearing, the court below dissolved the injunction and dismissed the bill with damages and costs. From that decree Peebles has prosecuted this appeal.

In deciding whether the contract in this case was fraudulent or not, we shall not take into consideration the interfering claim, of which the appellant was informed by the appellee previous to entering into the contract; for although the representation made by the appellee as to the nature and extent of that claim, was not, perhaps, perfectly correct, yet as the testimony upon this point is thus vague and inconclusive, we would not think it sufficient to avoid the contract, if it were in other respects unexceptionable. But the fact is incontrovertibly established, that the balance of the tract which was the subject of the contract, and, indeed, almost the entire tract is covered by two other adverse patents, elder than that of Calk, under whom the appellee derives his title. That he knew of the existence of these claims anterior to the contract in question, is, notwithstanding the denial of it in his answer, very satisfactorily proven. Two witnesses, whose characters are unimpeached, depose to the facts; and their testimony is not only uncontradicted by any other evidence in the case, but is strongly fortified by the nature of the transaction and the circumstances of the case. Whether the appellee actually represented the tract sold as being clear of such interferences, or knowing of them concealed them from the appellant, is not material; for the suppression of the truth is, as well as the suggestion of the falsehood, sufficient to vitiate a contract. The former, as well as the latter is a violation of the principles of good faith. It proceeds from the same motives and is attended with the same consequences; and the motives and consequences of an action are the only *criteria* of its merits or demerits, both in law and

in ethics. That appellee did not disclose to the appellant these interferences, is evident. He does not even allege that he did so; on the contrary, he denies, in opposition to what the evidence establishes to be the fact, that he himself knew of their existence. The inference is, therefore, clear that he did not make such a disclosure to the appellant. If it had been made, we cannot doubt that it would have totally prevented the contract, or essentially have changed its terms; for no rational or prudent man would give the same for a tract of land covered with elder patents held by adverse claimants, that he would if it were not subject to such incumbrances.

The circumstance that the appellant agreed to look to Calk for his indemnity in case the land should be lost, can certainly afford no excuse to the appellant for concealing the interfering claims. This circumstance, as the indemnity provided, is evidently a very inadequate one, only proves at the same time, that the fact of concealment is rendered more probable, that it is more prejudicial to the appellant. Good faith is essential to the validity of all contracts. No less so in contracts where the vendee undertakes to risk the title, than in contracts of a different description.

We are, therefore, of opinion, that the contract should be rescinded, the assignment from the appellee to the appellant canceled, the bonds upon Calk given up, and the possession of the tract of land restored to the appellee; that the appellant account for the rents and profits of the land, while he shall have had the possession thereof, deducting therefrom the value of such lasting and valuable improvements as he may have made thereon; and that the appellee pay to the appellant the sum paid by him as part price of the land, with interest thereon at the rate of six per centum per annum from the time of payment, and that the injunction to stay proceedings upon the judgment at law be made perpetual.

The decree of the court below must be reversed with costs, and the cause remanded, that a decree may be entered agreeably to the foregoing opinion.

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This case is instructive taken in connection with the note to *Emerson v. Brigham*, *ante*, 109.

## TYREE v. WILLIAMS.

[3 BING, 365.]

**POWER EXECUTED BY FEME COVERT.**—A *feme covert* executrix may execute a power without her husband, and her deed as executrix for lands devised to be sold, is valid, although she is not privately examined.

**BID BY LETTER.**—If property be advertised for sale, and one offer a price by letter higher than any other bidder, and the property is conveyed according to the offer of the letter, the property will be considered as sold at auction, and the directions of a testator to sell his lands by auction will be held to have been substantially complied with.

**TIME OF PERFORMANCE IN EQUITY.**—Equity does not regard time as the essence of a contract, unless so expressly stipulated, therefore a specific execution will be decreed after the lapse of a stipulated time without performance, or an offer to perform, unless there has been culpable negligence or willful delay on the part of him who asks performance.

**BILL** in equity seeking the specific execution of a contract. The case appears from the opinion.

By Court, BOYLE, C. J. On the twenty-fourth of February, 1806, William Tyree and John Jordan entered into articles, whereby the former agreed to sell to the latter a lot in Lexington; and the latter, in consideration thereof, agreed to sell to the former two lots in Standford, which he claimed under William Henderson or his representatives; and also to pay the sum of eight hundred dollars, in sundry payments, the last of which was to be made on the first of January, 1808. Tyree was to convey to Jordan when Jordan conveyed to him, and Jordan stipulated to convey to Tyree whenever Tyree should convey to him; but no time was appointed when either conveyance should be made. Jordan afterwards sold the lot in Lexington to Williams, who, on the fourth of March, 1809, filed his bill in chancery to compel a specific execution of the contract, making Jordan, Tyree and Mason, who had purchased from Tyree his interest in the contract with Jordan and Wallace, who set up a claim to one of the lots in Standford by virtue of a purchase under an execution against Jordan, defendants. The court below decreed the specific execution of the contract, to reverse which decree this writ of error is prosecuted.

Several objections are made to the propriety of the decree. The first we shall notice is founded upon Wallace's claim to one of the lots in Standford. This objection is certainly entitled to very little weight. It does not appear that at the time of the sale under the execution, Jordan had the legal title to the lot in question; and it is clear, according to the repeated decisions of

this court, that a mere equitable title cannot be sold under execution. Besides, it does not appear that Wallace ever attempted to acquire the possession of the lot, or that he even had obtained a conveyance therefor from the sheriff; and finally, before the hearing of this cause he relinquished or disclaimed all his title in the lot, having his debt on Jordan otherwise satisfied or secured.

A second objection is founded upon the circumstance that subsequent to the time of entering into the contract with Tyree, Jordan became insolvent. In point of fact this is admitted to be true, and it is obvious that a warranty from Jordan alone would be less beneficial to the bargainee than at the time of the contract he had a right to expect; but the decree of the court below in this case requires, as a previous condition upon which the lot in Lexington is to be conveyed, that a person to whose solvency there is no objection shall join in the warranty. Without, therefore, deciding whether the insolvency of Jordan, if no responsible person were required to join him in the warranty, would be a sufficient objection to prevent the specific execution of the contract, it is plain that the force of the objection is destroyed by the requisitions of such a security.

The third objection which demands the attention of the court is founded upon the delay in the execution of the contract on the part of Jordan. Where a time is fixed for the performance of a contract, it is at law considered to be of the essence of the contract; but unless the parties have expressly stipulated that it shall be so, it is otherwise considered in a court of equity, and its execution will be decreed, notwithstanding the time has elapsed for its performance, unless there has been a culpable negligence or a willful delay on the part of him who is seeking the aid of a court of equity. But where there is no time appointed for the performance of an agreement, as in this case, either party may even at law have a remedy at any period within the time prescribed by the statute of limitations, provided he shows himself ready to perform the agreement on his part. *A fortiori* will a court of equity extend its aid in such a case. But there is the less reason for sustaining the objection in this case, since it appears that each party was put into the peaceable possession of the property for which he had contracted, and for aught that appears to the contrary, has continued so ever since.

It is true that at the time of filing the bill Jordan had not obtained a conveyance for one of the lots in Standford; but it was afterwards, on the twenty-fifth of August next after the bill

was filed, conveyed by the trustees of the town of Standford to the complainant Williams; and the defendant Mason in his answer to the original bill, which was, in fact, filed subsequent to the date of the conveyance to Williams, admits his willingness to convey the Lexington lot upon the execution of the contract on the part of Jordan; nor was there any objection made on the score of delay, until the fact of the conveyance to Williams was disclosed in a supplemental bill. It is apparent, therefore, that the objection is disingenuous, and having once waived it the defendant could have no right afterwards to insist upon it.

The fourth and last objection we shall notice questions the sufficiency of Jordan's title to one of the lots in Standford. This lot was conveyed to Jordan by Samuel Baird and Mary M. Bell, surviving executor and executrix of William Henderson, deceased. Henderson, being possessed of the legal title to this lot, made his will, by which, after devising all his real and personal estate to his wife, he directed all his possessions in the town of Standford to be sold at public auction by his executors at twelve months' credit. The lot in question was advertised and exposed to public sale. A few days before the sale Jordan, by letter, informed the executors what price he would give, and no person having bid as much on the day of sale, the lot was afterwards conveyed to him at the price he had offered. It is admitted that Mrs. Henderson, now Mrs. Bell, had intermarried with her present husband before she executed the deed of conveyance to Jordan, and that she was at that time a *feme covert*.

It is contended in the first place that Jordan's title is defective, because the sale to him was not at public auction, as the will had directed. The object of the testator in requiring a sale at public auction was no doubt to obtain as high a price as possible; and as the price given for the lot by Jordan was greater than any other person was willing to give at auction, that object was fully attained, and the intention of the testator substantially complied with. But perhaps the sale to Jordan ought in strict propriety to be denominated a sale at auction. It is not necessary that a person should be present at an auction to become a purchaser; he may, as Jordan did in this case, make his bid by letter. As his bid was the highest, and the lot was in fact exposed to public sale, he may well be considered the purchaser at the sale.

But it is contended in the second place that Mrs. Bell could not legally execute the conveyance without joining with her husband, and being privily examined as the law concerning

conveyances directs. There is no doubt that a *feme covert* may act *en autre droit* without her husband. It is said if *cestui que use* had devised that his wife should sell his land, and made her executrix and died, and she took another husband that she might sell the land to her husband, for she did it *en autre droit*, and her husband should be in by the devisor: Co. Lit. 112, a. Mr. Hargrave, in his annotation upon this passage in Coke, says, "it is agreed in the books that a wife may without her husband execute a naked authority, whether given before or after coverture; and the rule, he observes, is the same where both an interest and an authority pass to the wife, if the authority is collateral to and doth not flow from the interest; because then the two are as unconnected as if they were vested in different persons:" Note 6, to Co. Lit. 112, a. In this case there is no doubt that Mrs. Bell had an interest in the lot conveyed to Jordan; for all the estate, both real and personal, was devised to her. But the interest vested in her individual right, and the authority to sell was given to her in the capacity of executrix. The latter, therefore, did not flow from the former, but was collateral thereto; and consequently they were as unconnected as if they had been vested in different persons. Upon the principles of the common law, then it is evident Mrs. Bell might, without her husband joining, execute the conveyance; and it is clear that the statute concerning conveyances can have no effect upon the case, for that statute only enables a *feme covert* to convey her interest or estate by observing the requisites prescribed in cases where she could not do so before, but does not disable her from executing an authority which she might do according to the principles of the common law.

Decree affirmed with costs.

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## HART v. HAWKINS.

[3 Binn, 502.]

**PARTNERSHIP LANDS—SURVIVORSHIP.**—The title to the land obtained in the name of one of the partners, the other having died, and a sale made by him, to persons with notice, does not affect the rights of the heirs of the other partner; the right does not survive.

**DIVISION AMONG CO-TENANTS.**—In a division of land among co-tenants it is not necessary that each should receive of the several parcels held; it is sufficient that the part of each is of equal value, though made up of entire tracts.

**CONSTRUCTIVE NOTICE.**—Extra-judicial proceedings do not operate as constructive notice; but express notice obtained from such proceedings will operate against a purchaser, relying on the want of notice.

**DESCRIPTION OF LAND IN DEED.**—A deed which conveys no particular spot of ground can transfer no title nor bar a prior equity.

**PRIOR EQUITY, WHEN TO PREVAIL.**—A purchaser relying on want of notice must have paid the consideration and have the conveyance executed to him before his claim shall prevail over that of a prior equity.

THE opinion states the case.

By Court, LOGAN, J. This is a suit in chancery instituted by the devisees and legal representatives of Nathaniel Hart, deceased, against John Hawkins and others, for the recovery of a certain tract of land, upon the following case, to wit:

On the third of April, 1779, Hart and Hawkins entered into a copartnership for the purpose of opening a trade and carrying on business in the mercantile way, on the waters of the Ohio; each stipulating to bring into stock within a short and given period one thousand pounds, to be immediately advanced for negroes, horses, or merchandise, as should be thought most advantageous to the company. On the sixth of the same month Hart advanced for the use of the company seven hundred and fifty pounds, for which Hawkins receipted; and at the same time passed his note to Hart for the further sum of five hundred and nine pounds, sixteen shillings; and having set out for Kaskaskias, on the business of the company, wrote to Hart from thence on the sixth of May, unfavorable to the prospect of trade at that place. Nothing further appears to have passed between them until the fall of the same year, when Hawkins, having returned to Kentucky, laid out said money in the purchase of two settlements and pre-emptions, one from Daniel Turner and the other from Thomas Barton; the latter of which he exchanged for the settlement and pre-emption of John Briscoe, which he afterwards located on the Ohio. For Barton's claim he paid seven hundred pounds, in hand, and passed his note with Levi Todd his security for seven hundred pounds more, payable on or before the last day of March then ensuing. This note Hart discharged.

Hart died in the year 1782, having duly made his last will and testament, by which his children are all made interested in the whole of his estate, real and personal. And on the eighth of September, 1784, Hawkins wrote from the county of Hanover, directed to Isaac Shelby, who had intermarried with one of the heirs of Hart, or in his absence to the executors of said Hart,

informing them of the partnership; of his having received from their ancestor a sum of paper money for the use of said company; of the failure in the purchase of goods, owing to the depreciation of paper currency in the Illinois country; of his having retained the money until he returned to Harrodsburg, where he laid it out in the purchase of the settlements and pre-emptions aforesaid, and as he had purchased those claims in part with the money of their ancestor, he thought them justly entitled to a moiety of the lands; and requested, as they were living near the land, and were equally interested in its security, that they would take care of and have it patented. In the year 1794, Hawkins sold and conveyed the whole of the tract on the Ohio, and having previously sold parts of the other tract lying on Hickman, Hart's representatives preferred their bill against both Hawkins and the purchasers, to recover the latter tract, alleging that they were purchasers with notice; and Hawkins having died pending the suit, it was revived against his heirs.

The right of the complainants is asserted upon two grounds:

1. As resulting from the nature of the partnership; 2. From a subsequent agreement between the partners.

If the complainants have right by virtue of the copartnership, it is through the operation of a resulting trust, for the partnership was of a mere mercantile nature, relating to trade of a personal quality, and not extended to speculations in land. It is presumable that Hawkins did not suppose in the purchase of those lands that Hart would necessarily be bound to take part of the purchase, from the firm existing between them, because he procured the transfer of the claims in his own name. But whether he might not have intended that Hart, if he chose, should become a partner, and have afterwards entered into such agreement with Hart, thereby consenting on his part to let Hart in for an equal benefit of the purchase, and Hart agreeing to waive all demand for the money he had advanced for the benefit of the copartnership. This question we shall proceed to examine before we take farther notice of the doctrine in relation to resulting trusts.

With respect, then, to an agreement and understanding between the partners upon the subject of this purchase. There is no positive evidence of such a contract. It rests upon circumstances which, it must be concluded, ought to be strong indeed, and carry with them the fullest conviction, in order to justify a specific recovery at this distant period. The inquiry then is, Will those circumstances produce such conviction? Hawkins was in

the possession of funds belonging to Hart and himself. He entered into contracts beyond the extent of those funds, and passed his note with Levi Todd his security for a balance of the purchase-money, payable in a short time. This sum he induced his creditor to believe would be paid by Hart; for the obligee deposes that when he sold his claim to Hawkins, he understood it was purchased in partnership between Hawkins and Hart; and as a reason for being satisfied that this was the case, states that Hawkins paid one half of the purchase-money, and the other half he expected to receive from Hart, which Hart afterwards paid. Here the inquiry properly arises from whom the witness received the information that this was a purchase in partnership; and by whom he was referred to Hart for the balance of the payment? It is not pretended that Hart was present. The contrary is clearly inferable; because the note for the residue of the debt which he was expected to pay, was executed by Hawkins and Todd, his security, and not signed by Hart.

Now had Hart been present, as the witness expected the payment from him, Hart would certainly have executed the note, or the witness would be able to account for his not doing it. As, then, Hart was not present, it would seem the probable and just conclusion that the witness received his impression from Hawkins as to a partnership between them, and that by him he was referred to Hart for the balance of the payment. He was the purchaser from this witness, and the partner in trade with Hart. In the absence of Hart the witness is induced to expect payment from him, and is impressed with the connection in trade between him and the purchaser of his claim. Now, although Hawkins might not have supposed that Hart was bound from the nature of their partnership to risk his money in a speculation of the kind, and therefore induced to take the transfer of those claims in his own name, nevertheless he might have expected that Hart would consent to become a partner in them, and have intended that he should, if he chose so to do.

Now that Hawkins intended that Hart should be interested in the purchase of those lands, seems obvious from the following considerations: 1. The impression made upon the seller, as already mentioned, of a connection in the purchase. 2. That Barton, the seller, was referred to Hart for payment of the balance of the purchase-money, seven hundred pounds, one half of the consideration stipulated to be given, although at the time Hart was not indebted to Hawkins, but Hawkins largely indebted to Hart for the sums received in the month of April pre-

ceding. 3. That Hawkins never paid Hart the said sums of money, or appears even to have intimated payment thereof, and from his letter of 1784, recognizing the justness of a claim in Hart's heirs to a moiety of those lands. Besides a strong argument may be drawn from the fact of Hart having paid off the note for seven hundred pounds, to show that Hawkins had not only expected as at first, but thereby recognized Hart as a partner in those lands; for who directed Hart to pay the debt, and why should he have been induced to make the payment? All these circumstances combined, and they must force an impression of the most indubitable stamp upon a mind not hardened against conviction. And that Hart on his part accepted of the offer, and agreed to become a partner in those lands, is not less obvious, because he paid the seven hundred pounds to Barton in discharge of Hawkins' note, and because he never pretended a demand for those sums as debts due from Hawkins.

Having then shown that there must have been an agreement and perfect understanding between Hawkins and Hart as partners of those lands, independent of all right resulting from their original copartnership, it will be only necessary to examine that subject with a view to ascertain whether, if Hart could have been entitled under it to any part of those lands, the right would survive to his co-tenant?

The rule in this respect seems to be, that the *jus accrescendi* or right of survivorship is never allowed, wherever the partnership is for the purposes of trade, or the undertaking is in the nature of merchandising upon the hazard of profit or loss: 3 P. Wms. 160; 1 Vern. 217; 2 Munf. 277. The case cited from Munford is very analogous to the one under consideration upon the question of survivorship. That was the case of two partners in a drove of cattle, who, having applied part of their drove to a joint purchase of a settlement right to land, one of them died; the survivor had the land surveyed, and having sold it to a third person with notice, who obtained a grant for the whole tract, upon a bill in equity, it was held that the right did not survive, and a decree to one claiming under the heir of the other partner for his share of the land. That case differed from the present only in this: that was a joint purchase, and so no doubt as to the right of each partner in the land. They concurred in the purchase; neither could claim the exclusive benefit of the bargain; neither deny his share of the loss. But with respect to the question of survivorship, the cases seem precisely analogous. To suppose Hart jointly concerned in the purchase

with Hawkins, then no difference in the cases will exist. It is not, therefore, material to the interest of the defendants, that Hart should be considered a joint-purchaser under the articles of partnership; since, if he were, his right nevertheless would not survive to the copartner, but would descend to his heir or devisees.

While upon the subject of surviving rights between joint-tenants, it may not be improper to inquire whether from that source any benefit can be derived to the defendants from the subsequent agreement between Hawkins and Hart. Hawkins derived his right from the assignment of those claims to him through the agency and act of the claimant transferring them, and Hart from an agreement of subsequent date between Hawkins and himself; the right of the one being created at one time by one act, and that of the other at a different time by another act. But it is essential to a joint-tenancy, that it should be created by one and the same act. The unity of interest necessary to constitute joint-tenants, would be disregarded were this to be pronounced a joint-tenancy.

We shall proceed now to an examination of other points in the cause which have been urged as objections to a recovery. It is contended that the expenses of carrying those claims into grant were entirely defrayed by Hawkins; that for that purpose he was compelled for want of funds to make sales of the land; that Hawkins, in his letter of 1784, was induced to make a tender of an interest in the lands, to avoid a sacrifice; and that the failure of the complainants to conform, ought to exclude their right to the land. This objection is founded on a mistaken view of facts. The most of the surveys were made before, and the others very shortly after the date of the letter from Hawkins to Hart's representatives; before the letter could in all probability have reached any of them, and long before any sales of said lands were made. For all legal reasonable or customary expenses, however, necessarily incurred, the complainants must contribute an equal proportion upon a settlement of accounts. But in fact it appears that Hawkins had received nearly, if not fully, as much money from Hart as was necessary to defray his equal proportion of the supposed original purchase, expenses for surveying and consummating the titles to said lands. The objection, therefore, seems less entitled to weight than at first it might seem to merit.

The objection to the *staleness* of the demand, arising with the increased value of the lands, is also entitled to less weight than

at first view it appears to claim. Suit upon the same right was commenced and decided in the court of the United States for the Kentucky district, and ultimately dismissed by the appellate court for want of jurisdiction in the inferior court. This circumstance will in some measure account for a seeming supineness on the part of the complainants. But one not less entitled to weight with the Chancellor may be found in the situation and infancy of most of the complainants, for many years after the death of their ancestor, as well as in those left with the management of the estate of their testator. The right exists, and a satisfactory apology or excuse for its neglect may measurably be found on the circumstances mentioned.

It was argued that the bill of the complainant's does not set out a case corresponding with the proof, and that therefore a decree ought not to be pronounced in their favor upon the evidence differing from the allegations in the bill. The bill sets forth a right upon the articles of copartnership, the application of the funds in the purchase of lands, and the letter of 1784, as relating back to the purchase and recognizing the right from its origin. The evidence of Barton has relation to the same purchase, and would, was the matter contained in it most specially charged, claim the same decree as that set forth in the bill. It is not necessary to set forth the facts in the *minutiae* of the evidence—a substantial correspondence is sufficient.

It remains next to consider what shall be the extent of the recovery of the settlement and pre-emption as assignee of Turner? In the partition and division of lands among cotenants, it is not necessary that each should receive of the several parcels holden. It is sufficient that the part of each is of equal value, though made up of entire tracts. Now, Hawkins having sold and conveyed the whole of one settlement and pre-emption, it follows that the complainants ought to recover of the other tract as much more than their equal proportion as will make up for their part in the tract sold by their cotenant. How much that shall be, must be ascertained by the relative value of the two tracts of land. And the proper measure to be observed in ascertaining that value has been determined by this court on a similar question to be with the incumbrances of conflicting claims. The damage sustained by the act is the value of the thing sold; and that value must measurably depend on the incumbered state of the property from other interfering claims.

Another, and perhaps the last branch of this cause for the consideration of the court, is as to the rights of those who claim

to be protected as innocent purchasers for a valuable consideration without notice. Two hundred acres of this settlement and pre-emption was sold by Hawkins to David Crenshaw, and one hundred and thirty acres sold to John Alexander, both of whom, it is contended, were purchasers without notice. Each purchased about the year 1787, and Crenshaw states in his answer that he paid down the full price, and received a deed for two hundred acres, but without describing the lines, courses and distances of the same, which he caused to be recorded. This deed is not exhibited, but one executed to Crenshaw bearing date the sixteenth of June, 1798. The former deed, it is presumed, cannot be expected to influence the decision of the cause, as it is not adduced; as another has been obtained, and as the former attached to no particular spot; nor was in common, but as he states was to be his choice of the pre-emption. This cannot have vested in Crenshaw the legal title to any part of the land, without which his equity being junior to that of the complainants, cannot prevail against their claim. It is not denied in his answer that he had notice before obtaining the deed of 1798; he only relies on the proceedings in the federal court, as being extra-judicial, and therefore as not conveying notice without denying actual notice. It is true extra-judicial proceedings do not operate as constructive notice; but express notice obtained from such proceedings as in any other manner will operate against the right of a purchaser relying on the want of notice. The bill charges the fact of notice before the legal title was acquired; the fact was in the knowledge of the defendant, and he does not deny the allegation only in reference to the time of his first deed. Now the law is too clearly settled to be questioned by us, that both the consideration must have been paid and the conveyance executed, to protect the purchase from the prior and therefore superior equity of the complaining party: 3 P. Wms. 307; 1 Atk. 384; 2 Id. 630; Sug. on Vendors, 547.

With respect to the purchase of Alexander, his deed was executed in February, 1800, and he states in his answer that he paid part of the purchase-money at the time of the purchase, and remained in possession of the land without any notice of the complainant's claim until the institution of the suit in the federal court set forth in the complainants' bill. The bill alleges that that suit was instituted in 179-. The fact, therefore, of notice prior to February, 1800, is evident; and upon the authorities before cited the complainants must recover.

Upon the whole, therefore, it is the opinion of this court, that

the complainants are entitled to one equal moiety of the settlement and pre-emption on the waters of Hickman, and as much more as at its value will make up for one half of the settlement and pre-emption on the Ohio, according to its value. In the division, however, of the Hickman tract, it will be proper to regard the improvements, etc., of the purchasers if the just proportions can be otherwise obtained in reasonable form.

Decree reversed, and the cause remanded, that a decree conformable to the foregoing opinion may be entered; the appellees to pay to the appellants their costs herein expended.

CASES  
IN THE  
SUPREME COURT  
OF  
LOUISIANA.

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JOHNSON *v.* DUNCAN.

[3 MARTIN, 530.]

**CONSTITUTIONALITY OF SUSPENSION LAW.**—Where there is some public necessity, as in case of war, or invasion, an act suspending legal proceedings, for a limited period, is not unconstitutional; for a statute of this kind rather conduces to the due administration of justice, and is beneficial to parties litigant.

**POWER TO PROCLAIM MARTIAL LAW.**—The power of the president, under the constitution, to call out the military forces of any part of the Union, in case of invasion, may be exercised by his delegate, as a commanding officer in a particular district, and all citizens, subject to militia duty, may be thereby placed under military law, but this is the extent of martial law, and all beyond it is usurpation.

The case appears from the opinion.

**MARTIN, J.** A motion that the court might proceed in this case has been resisted, on two grounds:

1. That the city and its environs were, by general orders of the officer commanding the military district, put on the fifteenth of December last under strict martial law.

2. That by the third section of an act of assembly, approved on the eighteenth of December last, all proceedings in any civil case are suspended.

1. At the close of the argument on Monday last, we thought it our duty, lest the smallest delay should countenance the idea that this court entertain any doubt on the first ground, instantly to declare *viva voce*, although the practice is to deliver our opinions in writing, that the exercise of an authority vested by law in this court could not be suspended by any man.

In any other state but this, in the population of which are

many individuals, who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the judges of this court should, in complying with the constitutional injunction, in all cases to adduce the reasons on which their judgment is founded, take up much time to show that this court is bound utterly to disregard what is thus called martial law; if anything be meant thereby but the strict enforcing of the rules and articles for the government of the army of the United States established by congress, or any act of that body relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet we are told that by this proclamation of martial law, the officer who issued it has conferred on himself over all his fellow-citizens, within the space which he has described, a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

This bold and novel assertion is said to be supported by the ninth section of the first article of the constitution of the United States, in which are detailed the limitations of the power of the Union. It is there provided, that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of invasion or rebellion, the public safety may require it. We are told that the commander of the military district is the person who is to suspend the writ, and is to do so whenever, in his judgment, the public safety appears to require it; that, as he may thus paralyze the arm of justice of his country in the most important case, the protection of the personal liberty of the citizen, it follows that, as he who can do the more can do the less, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law.

This mode of reasoning varies *toto celo* from the decision of the supreme court of the United States, in the case of *Swartout and Bollman*, arrested in this city in 1806, by General Wilkinson. The court there declared, that the constitution had exclusively vested in congress the right of suspending the privilege of the writ of *habeas corpus*, and that body was the sole judge of the necessity that called for the suspension. "If at any time," says the chief justice, "the public safety shall require the suspension of the powers vested in the courts of the United States by this act, the *habeas corpus* act, it is for the legislature to say so. This question depends on political considerations, on which the legislature is to decide. Till the legislative will be expressed, this court can only see its duties, and must obey the law:" 4 Cranch,

101. The high authority of this decision seems, however, to be disregarded, and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this state; it is, therefore, meet to dispel the clouds which designing men endeavor to cast on this article of the constitution, that the people should know that their rights, thus defined, are neither doubtful nor insecure, but supported on the clearest principles of our laws.

Approaching, therefore, the question, as if I were without the above conclusive authority, I find it provided by the constitution of this state, that "no power of suspending the laws of this state shall be exercised, unless by the legislature, or under its authority." The proclamation of martial laws therefore, is intended to exercise powers thus exclusively vested in the legislature. I, therefore, cannot hesitate in saying that it is, in this respect, null and void. If, however, there be aught in the constitution or laws of the United States that really authorizes the commanding officer of a military district to suspend the laws of this state, as that constitution and these laws are paramount to those of the state, they must regulate the decision of this court.

This leads me to the examination of the power of suspending the writ of *habeas corpus*, and that which it is said to include, of proclaiming martial law, as noticed in the constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exist in the executive, under whose authority it has been endeavored to exercise it, it exists without any limitation; then the president possesses without limitation a power which the legislature cannot exercise without a limitation; thus, he possesses a greater power alone, than the house of representatives, the senate and himself, jointly. Again the power of repealing a law, and that of suspending it, which is a partial repeal, are legislative powers; for, *eodem modo, quo quid constituitur, eodem modo destruitur.* As every legislative power that may be exercised under the constitution of the United States is exclusively vested in congress, all others are retained by the people of the several states.

In England, at the time of the invasion of the pretender, assisted by the forces of hostile nations, the *habeas corpus* act was indeed suspended, but the executive did not thus of itself stretch

its own authority; the precaution was deliberated upon and taken by the representatives of the people: De Lolme, 409; and there the power is safely lodged without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have gratified, when they shall have thus overthrown the columns of public liberty: *Id.* 275.

If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer, that in peace or war, no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, "martial law cannot be used without the authority of parliament:" 5 *Comy.* 229. The authority of the monarch himself is insufficient. In the case of *Grant v. Sir C. Gould*, H. Bl. 69, which was on a prohibition, applied for in the court of common pleas, to the defendant, as judge advocate of a court-martial, to prevent the execution of the sentence of that military tribunal, the counsel who resisted the motion said that it was not to be disputed that martial law can only be exercised in England so far as it is authorized by the mutiny act, and the articles of war, all which are established by parliament or its authority; and the court declared it totally inaccurate to state any other martial law as having any place whatever within the realm of England. In that country and in these states, by martial law is understood the jurisprudence of these cases, which are decided by military judges or courts-martial. When martial law is established and prevails in any country, said Lord Loughborough in the case cited, it is totally of a different nature from that which is inaccurately called martial law, because the decisions are by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. When martial law prevails, continues the judge, the authority under which it is exercised claims jurisdiction over all military persons, in all circumstances; even their debts are subject to inquiry by military authority; every species of offense committed by any person who appertains to the army, is tried not by a civil judicature, but by the judicature of the corps or regiment to which he belongs.

This is martial law as defined by Hale and Blackstone, and which the court declared not to exist in England; yet it is confined to military persons. Here it is contended, and the court

must admit, if we sustain the objection, that it extends to all persons; that it dissolves for a while the government of the state. Yet, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court-martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the civil judge: De Lolme, 447; Jacob's Law Dict. *verbo* Court Martial. How preposterous, then, the idea that a military commander may, by its own authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism!

2. It is further contended, that the third section of the act of assembly, approved on the eighteenth December last, suspends all proceedings in civil cases until the first of May next; but it is answered that this section is unconstitutional and void, inasmuch as it violates the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, this law's delaying for upwards of four months the recovery of sums due on contracts. It is no longer a question in the United States, whether unconstitutional acts of the legislature be of any force and effect. This state is among those, the constitution of which contains an express provision on this subject: "All laws contrary to this constitution shall be null and void;" and this court, in the case of the *Syndices of Brooks v. Weyman*, 3 Martin 12, determined it was their province to inquire into and pronounce upon the constitutionality of any law invoked before them. If, therefore, the section under consideration really impairs the obligations of contracts, we must declare it null and void.

The obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing, something. This obligation exists generally both *in foro legis* and *in foro conscientiae*, though it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which the framers of the constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. Now, a law absolutely recalling the power which the creditor enjoys, of compelling his debtor *in foro legis* to perform the obligation of the contract, would be a law destroying the obligation of the contract *in foro legis*; since a right, without a legal remedy,

ceases to be a legal right. It would impair the obligation of the contract, by destroying its legal obligation; in other words, by reducing an obligation both *in foro legis* and *in foro conscientie* to an obligation *in foro conscientie* only; a legal and moral right to a moral right only. The remedy *in foro legis* constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation, is one which *in foro legis* destroys the obligation. It appears, therefore, to me incorrect to say that the legislature may effectually do, as to the remedy or effect of the obligation, that which it cannot do as to the right; and I conclude that a law destroying or impairing the remedy is as unconstitutional as one affecting the right in the same manner; for, *in foro legis* the effects of both laws must be the same.

Likewise a law procrastinating the remedy, generally speaking, destroys part of the right. He pays less who pays later: *Minus solvit qui serius solvit*. Neither is the procrastination properly compensated by the allowance of interest in the mean while. To many men in many circumstances there is a wide difference between one hundred dollars payable to-day and one hundred and six dollars payable in a twelvemonth, whatever may be the certainty that no disappointment will occur; and in many cases the delay is likely to be productive of considerable danger to the solvability of the debtor. Any indulgence, therefore, in point of time, afforded by the legislature to the debtor, is a correlative injury to the creditor in the same degree, though of a different nature, as a correspondent indulgence by a proportionate reduction of the debt. That such were the impressions of the framers of the constitution will appear if, in expounding that instrument, we follow the rules laid down for the exposition of statutes; if we consider the old law, the mischief and the remedy.

The charter of our federal rights was framed not many years after the termination of the war which secured our independence. The disasters attending the arduous conflict had disabled many an honest individual from punctually discharging the obligations; and the legislature of some of the states, more attentive to afford immediate and temporary relief than a more remote and lasting one, by a sacred regard for good faith, and the consequent preservation of credit, passed laws, meliorating the condition of debtors to the injury and ruin of creditors. In one state an emission of paper money, for the redemption of

which no day was fixed nor any fund provided, was made a legal tender; in other words, an obligation to pay gold and silver was impaired by being reduced to an obligation to pay irredeemable paper. Elsewhere a similar obligation was impaired by being reduced to an obligation to deliver a tract of pine-barren land; or an installment law was passed, and an obligation to pay to-day was impaired by being reduced to an obligation to pay at several periods at the distance of intervening years. Such was the old law. The consequent diminution of the fortunes of several individuals, the total ruin of others, and the indispensable concomitant, the destruction of credit, produced a stagnation of business which considerably affected public and private prosperity; such was the mischief.

The federal compact provided that the legislature of no state should retain the power of making anything but gold and silver a tender in the discharge of debts, in order to avert in future the mischiefs resulting from laws impairing the obligation of a contract to pay gold and silver, by reducing it to an obligation to pay paper, pine-barren land, or indeed anything but gold and silver. Yet the remedy was not commensurate with the evil; the healing process was therefore continued, in order to prevent the passage of laws impairing the obligation of a contract to pay to-day by reducing it to an obligation to pay on a distant day or days, or indeed any attempt at a legislative interference between parties to a contract by favoring either party to the injury of the other; and it was provided that no state should pass any law impairing the obligations of contracts. If the restriction from making anything but gold and silver a tender in the payment of debts, had not preceded that from passing any law impairing the obligation of contracts, there might be some, though very little, ground to say that the latter clause would have been satisfied by restraining the passage of laws authorizing the payment of one thing instead of another.

I therefore find no difficulty in concluding that an act of a state legislature, the obvious object of which is to relieve debtors, by postponing the recovery, and consequently the payment of debts, impairs the obligation of contracts, and as such is unconstitutional; and the court is bound to disregard it, whatever may be the hard necessity which, in the opinion of those who exercise the legislative power of the state, appeared to require that they should come to the aid of their suffering fellow-citizens *Fiat justitia, ruat cælum.*

The people of the United States, assembled in federal con-

vention, have decreed that no state legislature should exercise the right of thus stepping in between the parties to a contract; and the judges are bound by their oath of office to prevent the violation of the constitutional injunction. It does not, however, necessarily follow that an act called for by other circumstances than the apparent necessity of relieving debtors, one of the consequences of which is, nevertheless, to work some delay in the prosecution of suits and consequently to retard the recovery and payment of debts, must always be declared unconstitutional. In making a contract each party must know that his legal remedy must depend on the laws of the country in which he may institute his suit; that the *lex loci* as to his remedy, even in the states that compose the federal union, is susceptible of judicial improvement; that the number of courts of original and appellate jurisdiction, the nature and extent of the respective jurisdiction of these, the number, time and duration of their sessions, must from time to time, especially in new and growing settlements, be regulated by the legislature, according to the wants and exigencies of the country.

If, for example, the sessions of the district courts, which in Louisiana are now held in each parish three times a year, were found too frequent, too inconvenient to jurors, witnesses and suitors, and too expensive to the state, no one can say that the legislature could not enact that the sessions of these tribunals should be semi-annual only. In most of the parish courts of this state, the trial by jury is not in use. Should the people of these parishes solicit the introduction of a jury in these courts, would the constitution be violated by this improvement in our judicial system? In Pennsylvania and Louisiana courts of equity, as contradistinguished from courts of law are unknown. Should the people of these states, noticing the advantages resulting from the division of law and equity proceedings in the neighboring states, see fit to try the experiment, is there aught in the constitution of the United States that forbids their representatives in general assembly to accede to their wishes? Yet semi-annual sessions of our district courts, the introduction of trial by jury, and the institution of courts of equity, must lengthen the period between the inception of many a suit and its final determination, and consequently delay some plaintiffs. But as the law introducing such alterations in the judicial system would be productive of advantages in which both parties to the contract would occasionally participate, they would not, it

is presumed, be considered as impairing the obligations of contracts.

Again, in time of war, domestic commotion, or epidemic, circumstances may imperiously demand, for a while, even a total suspension of judicial proceedings, a suspension which, in many cases, may be peculiarly beneficial to a plaintiff, who might be nonsuited if the court in which he may have instituted his suit were to proceed, while his duty, and that of his agents, and the interest of the state, called them to a distant part of the country. It would be dangerous in such times, and often impossible, to insist on the regular attendance of the officers of the court, of jurors, witnesses and parties. No one would in such cases doubt the ability, nay, the obligation of the court to adjourn to the probable period of returning tranquillity. Can it be said that the interposition of the legislature, if it happened to be in session, declaring the necessity of such an adjournment, and with a view to that order and regularity which uniformity produces, fixing a day on which judicial business will be resumed throughout the state, would be an act impairing the obligations of contracts?

Even if that day was fixed by half a dozen of weeks beyond that on which any of the courts of the state might conceive they might safely re-enter on the execution of their duties, would not such a court recognize some advantage in their forbearance from pressing business to the injury of such suitors, who, entertaining a different opinion, and having no previous knowledge of the determination of the court, might stay aloof, in the fair persuasion that the happy period was not yet arrived? I presume that in any time obnoxious to the due administration of justice, it is the duty and within the power of the legislature to pass laws to avert or diminish the consequences of the general calamity; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligations of contracts, though one of its consequences would be some delay in the recovery of debts.

Testing, therefore, the section under consideration by the principles I have endeavored to lay down, I find it stated in the preamble, that "the present crisis will oblige a great number of citizens to take up arms in the defense of the state, and compel them to leave their private affairs in a state of abandonment, which may expose them to great distress, if the legislature should not, by measures adapted to the circumstances,

come to their relief." The third section next provides, that "no civil suit or action shall be commenced or prosecuted before any court of record, or any tribunal of the state, till the first of May next." In fact, at the time the act was approved, the enemy was fast approaching, and five days after, made his appearance within five miles of the city of New Orleans. Shortly after, the whole militia of the state was called *en masse* into service, and they were not discharged till the middle of March. During the most of this period the fate of the contest was doubtful. It was, therefore, advantageous to all parties that the administration of civil justice should be confined to cautionary steps, which were not suspended. This was beneficial to all parties. Plaintiffs were relieved from attendance upon the courts, and the same indulgence was granted to defendants.

The object of this section of the act was, therefore, to prevent the ill-administration of justice, which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court and to every individual of the community the means of rendering himself as useful as he could in repelling the invading foe. From the moment the danger subsided, I mean from the discharge of the militia then called out *en masse*, about six weeks will elapse, a time barely sufficient for the return home of our fellow-citizens who dwell at the greatest distance from the spot which had been the theater of war. Violent diseases of the political as well as of the natural body, are followed by a convalescence, during which even ordinary exertions may be hurtful. It does not appear to me, that the suspension was for a longer time than the courts themselves would have taken, if they had been left to the exercise of their own discretion, unaided by a legislative provision. I am not, therefore, prepared to say that the interference of the legislature was anything else than the exercise of legitimate authority. The suspension of civil proceedings, under some authority or other, for a short time, was a measure imperiously called for; it has been beneficial to plaintiffs as well as to defendants, in several cases; and although it may create a little delay in the collection of debts, I do not find myself led by duty or inclination to consider the act as impairing the obligations of contracts, and I think it the duty of the court to comply with the object by enforcing the law.

DERBIGNY, J. On the first question, that which concerns the effect which the publication of the martial law has produced with respect to the civil authorities, we might well have omitted giving a written opinion, now that the return of peace has re-established the empire of the laws; but having declared, on the day on which the discussion of this subject took place, that the powers vested in us by law could not be suspended by any but legislative authority, it is proper that we should give some explanation of the reasons on which that declaration was founded.

I will, therefore, examine how martial law ought to be understood among us, and how far it introduces an alteration in the ordinary course of government. To have a correct idea of martial law in a free country, examples must not be sought in the arbitrary conduct of absolute governments. The monarch, who unites in his hands all the powers, may delegate to his generals an authority as unbounded as his own. But in a republic, where the constitution has fixed the extent and limits of every branch of government in time of war, as well as of peace, there can exist nothing vague, uncertain, or arbitrary in the exercise of any authority.

The constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that, in times of public danger, the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of the government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision; and had they done it, the states would have rejected a constitution stained with a clause so threatening to their liberties. In the meantime, conscious of the necessity of removing all impediments to the exercise of the executive power in cases of rebellion or invasion, they have permitted congress to suspend the privilege of the writ of *habeas corpus* in those circumstances, if the public safety should require it. Thus far, and no farther, goes the constitution. Congress has not hitherto thought it necessary to authorize that suspension. Should the case ever happen, it is to be supposed that it would be accompanied with such restrictions as would prevent any wanton abuse of power. "In England," says the author of a justly celebrated work on the constitution of that country, "at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the *habeas corpus* act was indeed suspended; but the executive power did not thus of

itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people, and the detaining of individuals in consequence of the suspension of the act was limited to a fixed time. Notwithstanding the just fears of internal and hidden enemies which the circumstances of the time might raise, the deviation from the former course of the law was carried no further than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers, and have all the usual legal means of defense allowed to them, such as calling of witnesses, peremptory challenge of jurors," etc. And can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may in certain cases, the necessity of which is to be judged by himself, assume a supreme, overbearing and unbounded power? The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own.

Under the constitution and laws of the United States the president has a right to call, or cause to be called, into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power exercised here by his delegate has placed all the citizens subject to militia duty under military authority and military law. That I conceive to be the extent of the martial law, beyond which all is usurpation of power. In that state of things, the course of judicial proceedings is certainly much shackled, but the judicial authority exists and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of *habeas corpus*, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice generally should be stopped; for, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases. The proclamation of the martial law, therefore, cannot have had any other effect than that of placing under military authority all the citizens subject to militia service. It is in that sense alone that the vague expression of martial law ought to be understood among us. To give it any

larger extent would be trampling upon the constitution and laws of our country.

But the counsel for the appellant, to support his assertion that in the circumstances then existing, the court could not administer justice, went further, and said that the city of New Orleans had become a camp, since it had pleased the general of the seventh militia district to declare it so, and that within the precincts of a camp there can exist no other authority than that of the commanding officer. If the premises were true, the consequence would certainly follow; but the abuse of words cannot change the situation of things. A camp is a space of ground occupied by an army for their temporary habitation while they keep the field. That space has limits; it does not extend beyond the ground actually occupied by the army. The camp of the American army, during the invasion of our territory by the British, was placed at a distance of four miles below the city. During that time the city might be considered as a besieged place, having an intrenched camp in front; but the transformation of the city itself into a camp by the mere declaration of the general, is no more to be conceived than would be the transformation of a camp into a city by the same means.

It is, therefore, our opinion that the authority of courts of justice has not been suspended of right, by the proclamation of the martial law, nor by the declaration of the general of the seventh military district that the city of New Orleans was a camp; and we now repeat what we declared when the subject was discussed, "that the powers vested in us by law can be suspended by none but legislative authority."

It now remains to examine whether we can proceed to hear the present motion on its merits, notwithstanding the act passed by the legislature of this state on the twelfth of December last, which provides among other things that all judicial proceedings in civil matters be suspended until the first of May next. The appellees contend that this act is contrary to the constitution of the United States, and to that of this state, inasmuch as it impairs the obligation of contracts, in opposition to positive prohibitions contained in both, against the enacting of such laws.

The right which courts of justice have to refuse their co-operation to the execution of unconstitutional laws, is no longer a question. It results from the obligation contracted by the judges to support the constitution, the fundamental and supreme law of the state, which no authority can shake. This

court has already had occasion to express that opinion in the case of the *Syndics of Booth v. Weyman*, 3 Martin, 12; but they have also there expressed their sense of the circumspection with which such a right ought to be exercised. It is only in cases where the incompatibility of the law with the constitution is evident that courts will go to the length of declaring null an act which emanates from legislative authority. Let us see if the law of the eighteenth of December last bears that character.

Does a law which retards the epoch at which a creditor may sue his debtor, impair the obligation of the contract? Such is the present question. "It is to be regretted," says one of the judges of the supreme court of the United States, "that words of less equivocal signification had not been adopted in that article of the constitution." I am of the same sentiment; for what is the import of that expression, "obligation of contracts?" Must it be understood only of the nature of the obligation contracted, or does it extend to the effects of the obligation? There are in a contract two sorts of obligations, one moral, the other legal; one by which the party binds himself *in foro conscientiarum*; the other, by which he submits himself to be compelled *in foro legis*. Now this legal obligation, according to some opinions, is nothing else than the remedy which the law gives to one of the parties to compel the other to the performance of his obligation. Abstract subjects are liable to receive more than one interpretation. To me, the right which the law gives to one party to force the other to comply with his obligation, is a thing totally different from the contract itself. Pothier calls that one of the effects of the obligation, which is evidently correct; after the party bound has refused, or neglected to comply, that effect of the obligation commences.

Now is that effect of the obligation comprehended within the article of the federal constitution alluded to? If it should be, then all the laws by which the least alteration is introduced in the manner of enforcing the execution of contracts, are contrary to that principle.

Thus a legislature could not lengthen the time within which the judicial seizures and judicial sales shall be made, nor retard or accelerate the course of suits, without impairing the obligation of the existing contracts; for where is the line of demarcation between the right of retarding one day, and that of retarding six months, the epoch when the creditor shall be paid? To me it is no satisfactory explanation to say that such

changes are lawful under the constitutional right which legislatures have to alter and reform the judiciary system, for such alterations and reforms might be introduced with the necessary reservations not to affect existing contracts. It appears to me, therefore, indispensable, in order to avoid falling into inextricable difficulties and contradictions, that a line be drawn between the obligation and the remedy. The one emanates from the will of the parties, the other is regulated by the law. The law owes to the citizen the aid of its power, to force to the performance of his obligation, him who neglects or omits to comply with it. A denial of that aid, or what would be as bad in its consequences, the withholding of that aid during an unreasonable and unnecessary delay, would be contrary to the first principles of the social compact, according to which the government is bound to protect the citizens in the enjoyment of their property, and as such ought to be opposed by that department whose peculiar duty it is to maintain justice.

But the manner in which the authority of enforcing the execution of contracts shall be exercised, and the proper time for exercising it, must be at the discretion of the legislature, to undergo modifications according to circumstances. In the present occurrence the legislature of this state, seeing the very existence of the republic at stake, the enemy at our doors, and the whole population under arms, thought it necessary to suspend, during a reasonable time, the ordinary course of justice. That was doing no more than would have resulted from the state of things. The administration of justice was already obstructed by the general call of the militia into service, which prevented almost all the citizens from attending to their business, rendered the convocation of juries impossible, and retained in the ranks of the army even the officers of the courts.

In such a situation, if the legislature had not decreed the suspension of judicial proceedings, that suspension would nevertheless have taken place. The courts themselves would have been under the necessity of adjourning their sessions to more happy times; that which the empire of the circumstances rendered inevitable, the legislature has done. I do not think that they have thereby overleaped the constitutional boundaries of their power. Unexpected fortunate events have changed the face of things before the epoch assigned for resuming the usual course of judicial proceedings; but if the delay fixed by the legislature, in their discretion, was not unreasonable, they have

done nothing more than they had a right to do, and the law must be obeyed.

The court therefore direct that the motion of the appellees be overruled.

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In the history of our jurisprudence, there cannot be found a more able and lucid exposition of constitutional law than is contained in this case. It admirably expounds and elucidates the distinction between moral and legal obligations, and shows how far legal remedies may be considered as legal rights, necessarily incident to contracts. This case, in connection with *Jones v. Oritenden*, ante, 531, will be therefore instructive.

In *Luther v. Borden*, 7 How. 83, the United States supreme court recognized the doctrine of this case as to the right to establish martial law. The Court saying: "A state of war may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs, and the near field of his military operations. \* \* \* On this rested the justification of one of the great commanders of this country, and of the age, in a transaction so well known at New Orleans."

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### MITCHEL v. McMILLAN.

[3 MARTIN, 676.]

FOREIGN BANKRUPTCY PROCEEDINGS.—Proceedings in bankruptcy in a foreign country, cannot operate so as to affect the rights of citizens under contracts made here.

THE case is stated in the opinion.

By Court, MARTIN, J. The petition states the defendant to be indebted to the plaintiff for the balance of an account current between the parties, which is annexed. The answer admits the debt stated, but avers that on the days of the dates of the first and last items of the account, and during the whole intermediate time, the defendant was a copartner in trade with James Sloane, of Liverpool, in Great Britain, and established at Charleston, S. C., as a branch of the house of Sloane & McMillan, of Liverpool, as the plaintiff at the time well knew; and that afterwards, viz., about nine months after the date of the last item in said account current, the partnership still subsisting, a commission of bankruptcy was awarded according to the laws of England, against the defendant, as a merchant, shopkeeper, and dealer in Liverpool aforesaid, and sixty days after the issuing of said commission he obtained his discharge or certificate in due form. The plaintiff demurred, and the defendant having joined in demurrer, the district court gave judgment for the defendant, and the plaintiff appealed.

The question for the solution of this court is this: Is a certificate of bankruptcy duly obtained in England, where, it is admitted, it works a complete discharge of antecedent debts, a bar to a suit brought in this state, by a person residing in the United States, and for a debt contracted there before the bankruptcy.

The affirmative is supported on the ground that the laws of commerce are a branch of the laws of nations, commerce being carried on amongst mankind for their common benefit; hence, wherever the property of an insolvent debtor may be found, it becomes, it is said, the common pledge of all his creditors, whether natives or aliens; amidst the wreck of his fortunes, all his creditors must fare alike. Bankruptcies, therefore, and consequently all questions concerning the condition of the bankrupt, are to be determined by the laws and customs of the country where the bankruptcy was declared; the legal forms of that country alone are to be pursued and exclusively adopted, and all the creditors must submit to all the conditions prescribed by the *lex loci*, in the same manner as all the creditors of a succession are bound to the magistracy of the place where it is opened. The discharge which ensues is said to be legal, irrevocable, and entire, and to preserve these characteristics even in foreign countries, with respect to creditors who reside there. A maxim of the law of nations is invoked, according to which all judgments and acts of the civil power, although emanating from a foreign authority, are to be respected and binding in every country, states owing this deference respectively to each other, as to the laws which they have made in their own territories, and as to the application which they have made of them to individuals living under their dominion; neither reason nor political convenience permitting that a man who is absolved in one place should be reputed guilty in another, nor that a debtor, liberated by the laws and the tribunals of the place where he had his domicile, should again remain a debtor and liable to process, if he should happen to remove to another place thereafter: Cooper's B. L., App. 29, 32.

Such are said to be the leading principles of the laws of France on the subject of bankruptcy. They were recognized by the supreme court of Pennsylvania in the case of *Millar v. Hall*, in 1788: 1 Dall. 228. "It is true," says Chief Justice McKean, "though the laws of a particular country have in themselves no extra-territorial force, no coercive operation, yet, by the consent of nations, they acquire an influence and obliga-

tion, and, in many instances, become conclusive throughout the world. Acts of pardon, marriage, and divorce made in one country are received as binding in all countries. He held that the insolvent law of a neighboring state should enjoy that weight in the courts of Pennsylvania which it naturally derived from general conveniency, expediency, justice, and humanity. "For mutual conveniency," added he "policy, the consent of nations, and the general principles of justice, form a code which pervades all nations, and must be everywhere acknowledged and pursued." Livingston, J., in the case of *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259], expressed his private opinion, though he concurred with an opposite judicial one, that a *cessio bonorum*, under the laws of a state in which the debtor had his permanent residence, ought to operate as his discharge from his creditors in every part of the world.

This subject is, however, considered in a very different and quite opposite point of view in the courts of Great Britain, in a case which is said to have settled the law on this question: *Smith v. Buchanan*, 1 East, 10; the court of king's bench there holding that a discharge in Maryland was no exoneration from a British debt, contracted prior to the bankruptcy, Lord Kenyon saying: "It is impossible to assert that a contract made in one country is to be governed by the laws of another. It might as well be contended, that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff should have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he applies to a court here to enforce, and the only answer is, that a law has been made in a foreign country, to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of his country, suing on a lawful contract made here? How can it be pretended that he is bound by a condition to which he has given no assent, either express or implied?"

It is not easy to arrive at a clear understanding of this branch of the law, without a close examination of the manner in which it has been expounded by courts of justice abroad and in these states; and as the certificate in the present suit was obtained in Great Britain, it will be peculiarly useful to examine what is the effect of a discharge under the bankrupt laws in that country. It seems that it once was a point admitted, and the idea does not appear to have as yet been exploded that the

bankrupt laws of Great Britain had no effect out of the isle. Lord Talbot and Lord Mansfield were of this opinion; a certificate under a commission in England will not bar a debt contracted in the British West Indies, where there are separate laws and judicatures: *Waring v. Knight*, Cooke's Bank. L. 373; Id. 522; Beaves Lex. Merc. 543. It has been determined in a case from Virginia, that the English bankrupt laws do not extend to the plantations: *Cleve v. Mills*, Cooke's Bank. L. 370; and in *James v. Allen*, 1 Dall. 188, Chief Justice Shippen said: "The bankrupt laws of England were never supposed to extend here (Pennsylvania) so as to exempt the persons of bankruptcy from being arrested."

In 1779, Lord Mansfield held, that if a bankrupt has money due to him out of England, as in St. Kitts or Gibraltar, the bankrupt laws so far vest the debts due him in his assignees, that the debtors in these places shall not turn them round by saying they are accountable to the bankrupt; but if, before the bankruptcy, the money be *bona fide* attached in those places, the assignees shall not recover the debt. Towards the middle of the last century, 1744, in the case of *Ex parte Burton*, 1 Atk. 255, which was that of a debt contracted before the debtor's *cessio bonorum*, in Holland, Lord Hardwicke observed, that the cession in the country in which it was made, discharged the person, but not the future property of the debtor. This has been considered as implying the opinion of the chancellor to be, that if it had discharged the future property also, the decision would have been a different one, and consequently the bankrupt law of Holland would have been taken as the guide of the court. This reasoning is far from being conclusive.

In the case of *Ballantine v. Golding*, cited in Cooke's B. L., Lord Mansfield is said to have holden as a general principle, that "where there is a discharge by the law in one country, it will be a discharge in another." But as in weighing the decision of courts, we much rather attend to what is done than to what is said, we cannot conclude that his lordship admitted this principle *lato sensu*; for this is quite inconsistent with his decision in the case of *Waring v. Knight*, already cited, in which he held a discharge in England not to be any in the West Indies. In considering the facts of this case, *Ballantine v. Golding*, we find all that it was necessary, and, therefore, all that it was intended to decide, is, that a discharge in the country where the debtor resides, contracts the debt, and is discharged, is a discharge elsewhere. Golding resided, contracted the debt, and was dis-

charged in Ireland. In the case of *Quin v. Keefe*, 2 H. Bl. 553, the court noticed the difference between a certificate granted out of the country in which the debt was created, and one granted in that country, and refused relief on a motion to discharge the bail. It appeared that the debt had been contracted in England, and the certificate obtained in Ireland; and the same consideration likely induced the judgment of the court in the case of *Smith v. Buchanan*, already cited, in which the debt was contracted in England and the certificate obtained in Maryland. From a view of the English authorities, it follows, that the tribunals of that country do not allow the discharge of a bankrupt, obtained abroad, to bar a debt created in England towards a British subject.

We cannot find that there ever was a decision of the supreme court of the United States on the question under consideration. It was twice sent up for final determination in that tribunal. In the one case the cause went off on another ground: *Emery v. Greenwood*, 3 Dall. 369; in the other the court was of opinion that the question was informally presented: *Dewhart v. Coulthaid*, Id. 409.

In the circuit courts of the United States, it appears to have been thrice determined. In Massachusetts district, in *Emery v. Greenwood*, 3 Dall. 369, the parties were both citizens of that district, and the debt had been contracted there; the defendant afterwards removed his domicile to Philadelphia, where he obtained a legal discharge, being afterwards occasionally in Boston, he was sued for the old debt and pleaded his Pennsylvania discharge. The court, presided over by Iredell, J., circumscribed the operation of the discharge to the state in which it was given. A different decision is said to have taken place in the Rhode Island district, the court being presided over by Wilson, J.: Id. *in notis*. In the Pennsylvania district the court presided over by Washington, J., supported the opinion of Iredell, J., saying that a defendant claiming a discharge under a certificate of bankruptcy obtained in a foreign country, should show that the debt was created there: *Green v. Sarmiento*. There is not any report of this case, it is cited from Cooper's *Justinian*, 623.

In the state of Massachusetts a discharge under the insolvent laws of another state has often been holden to afford no protection against a prior debt contracted in the former state. In the case of *Proctor v. Moore*, 1 Mass. 198, the defendant having his domicile in Connecticut, being occasionally in Mas-

Massachusetts, gave his note to the plaintiff, and returning home was afterwards discharged by the legislature of Connecticut. Being now sued in Massachusetts, he sought to avail himself of the discharge, but the court held his plea bad, as it did not show that the contract was made, and the plaintiff resided in Connecticut; for unless he was an inhabitant of Connecticut at the time of the contract, the proceedings of the legislature could not bind him, which, the court added, they had repeatedly decided.

The question has met with the same determination in the state of New York. In the case of *Smith v. Smith*, 2 Johns. 235 [3 Am. Dec. 410], the defendant, an inhabitant of Rhode Island, being on a visit to Massachusetts, had given his note to the plaintiff, and returning home had taken the benefit of the insolvent laws of Rhode Island. He was sued in New York, and the court held that the discharge could be no bar out of the state of Rhode Island. The student will notice this as a much stronger case than any that have been cited. Hitherto we have seen courts protecting their own citizens, or persons trading or residing in the state against discharges obtained abroad; here is a court exclusively confirming the operation of bankrupt laws to the country in which they were enacted; even when the creditors did not give credit, or resided in the state. In the case of *Van Raugh v. Van Arsdaln*, 3 Cai. 154 [2 Am. Dec. 259], the court said, "the insolvent laws of another state cannot take away the rights of a citizen of this state to sue here upon a contract made here, and which is binding by our laws."

The first adjudication that is recorded as having taken place in Pennsylvania, on the subject under consideration, is to be found in the case of *James v. Allen*. Chief Justice Shippen declared it to be the opinion of the court, that insolvent laws had never been considered as binding out of the state that made them: 1 Dall. 191. Shortly after was decided the case of *Millar v. Hall*, 1 Dall. 128, cited in the beginning of this opinion. The defendant resided in Baltimore, and was discharged from his debts under the laws of Maryland. He had received the money which was the ground of the debt, in Baltimore, but the agreement under which he had received it took place in Pennsylvania, where the plaintiff had his domicile, and where the suit was brought, and it was holden that his certificate protected him. This decision is apparently at variance with that given in the preceding one, but only apparently so. The law of Maryland, according to the first, is not binding out of that state;

in the latter case, the decision is that the law of Maryland is binding upon the debt created there, and justly destroys it, *eodem modo quo construitur, destruitur*. It arose and was dissolved under one law, and being dissolved by the law under which it was created, it must be recognized everywhere else as rightfully dissolved. It is true, in delivering the opinion of the court, Chief Justice McKean used a different, but not an opposite or contrary reasoning. But in the decision of courts we should rather attend to what is done by the court, than to what is said by the organ through which this judgment is conveyed.

In the cases of *Thompson v. Young*, 1 Dall. 294, and *Donaldson v. Chamberlain*, 2 Id. 100, the defendants being residents of Maryland, and having taken the benefit of the insolvent laws of that state, were protected by the courts of Pennsylvania. In the first case, the debt was created in Maryland, as appears from the report, and we conjecture that this was the case in the other, as the court grounded their decision on the authority of *Millar v. Hall*, from which it is probable the case was a parallel one. In the case of *Haines v. Mandeville*, 2 Dall. 256, both parties were British, and the debt created and the certificate obtained in the common country, and the defendant was protected by the courts of Pennsylvania; and, under similar circumstances, the party being French, the defendant was likewise protected in that state, in the case of *Leclercq v. Rouchette*, cited 1 Dall. 257.

From a review of these American cases, and they are all those to which we have been able to recur, it appears that relief has ever been extended to bankrupts who had been discharged in the country in which the debt was created; no instance occurs in which it was denied. In one case only, *Proctor v. Moore*, the court appears to have expected, as an additional requisite, that the plaintiff should also have, at the time of the contract, his domicile in the country in which the debt was created.

Comparing the American with British cases, we find no difference in the general conclusion, except in some early decisions holding the bankrupt laws not to extend to the West Indies or the American provinces. The courts in England have, however, so far taken notice of the bankrupt laws of other countries as to consider the assignment of bankrupt's effects in other countries, although in fact made *in invitum*, and consequently allow assignees deriving their titles under foreign ordinances to sue in England for debts due to their bankrupt's estate: *Hunt v. Potts*, 4 T. R. 182, 192. We find it nowhere adjudged that a

certificate obtained out of the country where the debt was created afforded any protection out of the country in which the discharge was obtained. In *Terrasson's case*, on which Mr. Duponceau has favored the American jurists with the opinion of learned counsel in Paris, we are not satisfied, from the statement of facts, that the lawyers consulted intended that what they said should be construed to extend to debts contracted out of Pennsylvania, although it must be admitted that the general way in which they argue leads to that conclusion: *Cooper's Bank. L. App.*

We cannot find that in any case, either in England or the United States, persons not domiciliated in the country in which the certificate was obtained, were bound by the discharge, when the debt was not contracted there. The authority of no adjudged case would support us in solving the question under consideration in the affirmative.

Let us now examine the question according to the ideas of the civil, or the Roman law writers. They all admit, that all business and transactions in court and out of court, whether testamentary or other conveyance or acts, which are regularly done, according to the laws of the place in which they take place, are valid also in other countries even where a different law prevails, and where, had they been so transacted, they would not have been valid. This principle, however, must be admitted with some caution. In testamentary cases it is also true, that the laws of the country where the succession is opened will be binding throughout the world, *i. e.*, that if the executor, administrator or curator dispose of the assets according to the law of the country, he will be protected even from the claims of creditors residing abroad. But this is only an elucidation of the principle we have deduced from the British and American cases, *viz.*, that the *lex loci* of the contract must regulate it throughout the world. If A. contracts with B. in London, and B. dies in Paris, where C. proves the will and has letters testamentary, A.'s claim rests on an express contract with B. in London, and an implied one with C. in Paris; for C., in taking up the execution of the will, and possessing himself with the estate of A., became bound to pay his debts according to the laws of France, on which the law raises an implied promise to each creditor to pay him what is due to him according to the *lex loci* of both places respectively; but the mode of payment, the order of procedure, the time, must be regulated in all cases according to the *lex loci* of the country in which letters testamentary are granted.

In the same manner would be regulated the rights of the creditors of a bankrupt against the syndics, assignees or trustees of the estate; for the obligation of the syndics, etc., which is the correlative of the rights of each creditor, is produced by the implied contract, resulting from the acceptance of the office or trust. In considering, therefore, the original claim of each creditor on the debtor, the law of the place where the contract took place must be the rule; but in considering the mode of payment, the precedence, the proportion and time of payment, the law of the place where the bankruptcy was opened must prevail, because it is the *lex loci*, the law of the place where the syndics, etc., contracted the obligation to manage the estate. Proceedings in cases of bankruptcies may well be likened to proceedings on successions, bankruptcies being successions in cases of commercial or civil death; but the resemblance stops there; the consequences as to the person or the future property of the bankrupt or debtor cannot be explained by anything in the case of a succession, which is that in which the original debtor has ceased to exist, both civilly and naturally.

That the law of the county where the debt was created must govern the case in the country where the discharge was obtained, cannot be denied. The moral obligation becomes a legal one—that is, receives its binding force *foro legis* from the *lex loci*, which *eodem modo quo construitur, eodem modo destruitur*. The *lex loci* is, then, that which the parties considered as that which was to enforce the obligation of the contract; it is one to which they gave their assent; they must take it for better and for worse. But to consider the law of the domicile of the debtor to be changed at his pleasure, as that which is to govern the case, from the circumstance that the bankruptcy was declared there, and thus to allow one party to choose the law by which the rights of his creditors are to be regulated, would be manifestly unjust. The debtor might seek some remote corner of the world where one tenth of his creditors, and perhaps one single creditor, might dictate the terms of the discharge. Hence, whatever may be said, *arguendo*, by any judge or counsel, we find no case in which a judge decided that the law of the place where the bankruptcy was declared is to be regarded out of it, when that country was not at the same time that in which the debt was contracted, or the joint domicile of both parties, or when the creditor was not an actual party to the proceedings.

In most countries, the bankrupt law is meant to protect the

honest but unfortunate debtor in the acquisition of future property for his own benefit. Humanity would seem to claim that the laws of all commercial countries should be ancillary to each other, and that the benign intention of the laws of the country in which a certificate of discharge is obtained should not be defeated by the tribunals of other countries in which the person or future property of a discharged bankrupt may afterwards happen to be found; but creditors have also rights which humanity cannot disregard, and which legislatures and courts of justice must protect.

If it were possible that an universal code of commerce could be devised, by which the proceedings which precede the issuing of a certificate of bankruptcy should be so regulated as to allow to present and absent creditors an equal opportunity of having their claims attended to, and to contest the pretensions of the debtor to his discharge, then could it be with propriety contended that proceedings in case of bankruptcy ought to have the same effect throughout the world, and equally bind the most distant as the next-door creditor. But alas! very little reflection must bring the conviction that this is an Utopian scheme. Commerce now embraces the four parts of the world. How is notice to be conveyed to merchants scattered over the surface of the globe? What length of time must elapse, if the opportunity is afforded, as justice requires, to each creditor to establish his right, take notice of, contest and disprove the allegations of the debtor? Will not the necessary delay defeat the object in view? How many creditors must prefer the abandonment of their rights, rather than incur the trouble, vexation and expense attending the assertion of them? If an universal legislature is required to frame this universal law, how are we sure that anything short of an universal judiciary will prevent partiality in the execution of it?

But, it is asked, shall the unfortunate debtor be ever without relief; shall he pine and languish in misery as long as he lives? The claim of misfortune to ease its burden on the shoulders even of the fortunate, must be sparingly enforced. Humanity can require no more from the bankrupt than that the country in which he has asserted his claim to relief, and against those to whom he has afforded an opportunity to contest it, his person and future property should be protected. Perhaps it is inexpedient that this protection should extend to a wider circle. It will, in most cases, afford to the exertions of honest industry a scope ample enough to insure to the honest debtor and his

family a decent support. If the means of launching into more extensive speculations are lost to him, his misfortune will, in some degree, compensate the damage his creditors have sustained, as his example will restrain others from rash enterprises. Until now we have considered all bankrupts, as persons merely unfortunate, not tainted with fraud or chargeable with any indiscretion. The law, however, presumes fraud in all cases of bankruptcy—that of Spain has a particular provision in this respect: *Mendes v. Larionda's Syndics*, 3 Martin, 705. That of France, for a long time, subjected persons who ceded their goods to their creditors, to ignominy; in some provinces they were compelled to wear a green cap. Fraud being legally presumed in a bankrupt, the greater part of insolvents are fraudulent debtors; out of those free from fraud, the greater number are perhaps chargeable with rashness and indiscretion. While the law therefore cannot extend its benign influence to both creditors and debtors, we cannot wonder that it should deny it to those among whom the fraudulent, the rash, and the indiscreet constitute a majority.

From the best consideration we are able to give to the question under examination, we must solve it in the negative, and declare our opinion that a certificate of bankruptcy obtained abroad cannot protect, in this state, the person or future property of the debtor against a claim of a citizen of the United States, for a debt contracted in the United States. This abstract proposition extends itself with more force to the present case, as the certificate was obtained in England, where the tribunals avowedly deny to bankrupts discharged in other countries any protection against the claims of British creditors, for debts contracted in Great Britain; for, from this circumstance, we must conclude that the law being thus settled there, little care is taken in proceedings on a bankruptcy to protect the interest of absent creditors. Indeed, in the present case, evidence is spread on the record that the proceedings ripened into a discharge in the short space of sixty days—a time too short for American creditors to have received notice and attend.

A circumstance has been noticed by the court from which the defendant meant to place his case in a different point of view than the one in which the court think they must consider it. It is stated that the defendant, at the time of the contract, and in the knowledge of the plaintiff, was a partner of Sloane, of Liverpool, and kept a branch of the house of Sloane & McMillan in Charleston, South Carolina, from which the inference is in-

tended to be drawn that the debt was created with a British house, and, therefore, with a reference to British laws; in other words, that the defendant, at the time the debt was created, had his domicile in Liverpool, when he kept a trading house in Charleston, South Carolina; and that as the certificate was obtained in the country in which the debtor had a domicile when he contracted the debt, the debt must be dissolved by the effect of the certificate. The partners of a mercantile house have each his respective domicile where they respectively dwell; otherwise a man might have his domicile where he never set his foot. But admitting the domicile of the defendant to have been in Liverpool, still he must fail, according to the decisions in *Proctor v. Moore*, and *Smith v. Smith*.

The district court, in the judgment of this court, erred in sustaining the defendant's plea. Its judgment must, therefore, be reversed and annulled; and this court, for the reasons aforesaid, doth adjudge and decree that the plaintiff do recover the sum acknowledged by the defendant to be due, and claimed in the petition, with interest from the date of the first process, and costs.

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See a similar doctrine in *Milne v. Moreton*, *ante*, 486.

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## FAURIE v. MORIN.

[4 MARTIN, 39.]

**PROMISE VOID.**—A promise made in consideration of the governor being prevailed on by the promisee to appoint the promisor to an office is not binding, being against public policy.

**APPEAL** from the district court. Faurie brought an action on a written contract by which Morin promised to pay her a certain sum in monthly installments. It appeared that plaintiff's husband, now deceased, had formerly held the office of public auctioneer, and that it was represented to defendant that the plaintiff had influence with the governor, who, the defendant was informed, had a right to grant away one half the profits of the office of public auctioneer; that in consideration of plaintiff's using her influence with the governor to obtain for defendant an appointment to that office, he promised to pay plaintiff the sum per annum expressed in the writing. Depositions were produced showing that such was the consideration of the promise, and that such influence had been actually used. Defend-

ant had received the appointment. Judgment being given for the defendant, the plaintiff appealed.

*Livingston*, for the plaintiff.

*Turner, contra*, to show that the contract was void, the consideration being against public policy, cited *Mackarell v. Tdderick*, Cro. Car. 337, 353, 361; *Morris v. Chapman*, T. Jones, 24; *Martin v. Blytheman*, Yelv. 197; *Parsons v. Thompson*, H. Bl. 322; *Garfort v. Fearon*, Id. 327; *Blackford v. Preston*, 8 T. R. 89; *Nerot v. Wallace*, 3 Id. 22; *Smith v. Bromley*, Doug. 676; *Waynel v. Reed*, 5 T. R. 599; *Vandike v. Hewit*, 1 East, 98; *Boothe v. Hodgson*, 6 T. R. 405; *Mitchel v. Cockburn*, 2 H. Bl. 379; *Aubert v. Mace*, 2 Bos. & P. 371.

By Court, MARTIN, J. It appears to this court, that the promise of the defendant Morin cannot support the action. From the instrument itself, it is manifest that the only consideration on which it rests is the illegal condition on which it is stated that the office was obtained. This condition is contrary to sound policy. Offices are to be granted absolutely without any condition. It is not in the power of the grantor to lessen the emoluments which the law has affixed to the discharge of official duties; it matters not to what use the share of emolument, thus carved out, is applied. The public will be ill served, if the circle within which an officer is to be selected, is narrowed by a reduction of the legal emoluments. If these are withdrawn from the incumbent, he may be placed under the temptation of compensating himself by speculation, extortion and fraud. The condition under which the office was obtained being illegal and void, it follows that the promise cannot support an action.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

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## GUILLOT v. DOSSAT.

[4 MARTIN, 203.]

**OBLIGATION OF JOINT-OWNER.**—A joint-owner is bound to that care which prudent men ordinarily have of their property.

**APPEAL** from the district court. The opinion states the case *Paillette*, for the plaintiff.

*Seghers, contra.*

By Court, MARTIN, J. The parties were joint-owners of a slave, the plaintiff for nineteen twentieths, the defendant for one twentieth. During the contest for the ownership of the slave, he was kept, without any opposition on the part of the plaintiff, by the defendant, who having finally been ordered by the court to deliver him to the sheriff, that a division might take place by a licitation, failed to produce him, and now being sued, resists the plaintiff's claim on the ground that the slave ran away, without any fault on the part of the defendant. The plaintiff contends that, admitting this to be the case, the defendant did not take any step for the capture of the slave, as he was bound to do, neither did he apprise the plaintiff of the flight of the slave, that he might take the steps which the defendant is alleged to have neglected; so the only question for the decision of this court is, whether the *quasi* contract of joint-ownership imposes the obligation of exercising ordinary diligence on the property which is the object of it, or whether fraud alone renders the joint-owner liable? The contract of partnership is the one which bears the greatest resemblance to the *quasi* contract of joint-ownership. The actions *pro socio*, *familæ erciscundæ et communi dividundo* appear to be regulated by the same principles.

In the Institutes, lib. 3., tit. 27, *de dolo et culpa a socio præstantis*, we are informed that it had been a question whether a partner, like a depositary, be accountable for fraud only, or for negligence also, and that the better opinion is that he is answerable for all damages which happen through his fault. *Prævalent tamen etiam culpæ nomine teneri eum*. We are next told that the utmost diligence, *exactissimam diligentiam*, is not required of him; that a partner is not liable for damages if he has used the same care and diligence in respect of the partnership's property, which he usually bestows on his own; and that whoever chooses a negligent man for his partner, must lay the blame on himself only, and impute his misfortune to his ill choice: Cooper's Instit. 283. Here the conclusion seems to be at war with the premises—the principle with the commentary. The contracts of partnership and deposit are assimilated, yet they widely differ; the one is for the benefit of both parties, the other for that of one of them only. We are told the partner is liable for his fraud only, afterwards for his fault also—his negligence, *culpæ*, i. e., *desidiæ atque negligentix nomine*. Finally, it is concluded, that if he uses with regard to the joint, the same diligence which he bestows on his personal property, he is not liable, yet the ab-

sence of that diligence would constitute fraud. The contract being useful to the partner, who holds the property, he ought to be bound to carefulness; not so the depositary; for the deposit being only a charge to him, he ought to be bound to honesty only.

The Digest, L. Contractus, 23, distinguishes two kinds of contracts—those in which fraud alone gives room to repetition, *qui dolum dumtaxat recipiunt*, as that of deposit; the other, those which besides good faith require diligence, as that of partnership: *Contractus quidam dolum dumtaxat recipiunt, quidam et dolum et culpam. Dolum tantum depositum . . . societas et rei communio dolum et culpam recipiunt.* In contracts and quasi contracts which are for the reciprocal advantage of the parties, as those of sale, exchange, partnership, and in the quasi contract of ownership, that care is required as to the thing which is the object of the contract, or quasi contract, which prudent men usually bestow on their own: *In societate, dolus et culpa præstat*, ff. l. 13, tit. 6, l. 5, s. 2.

The court concludes that a joint owner cannot discharge himself of his responsibility, in case of the loss of the thing, by showing that he has bestowed on it the same care which he bestows on his separate property, but is bound to show that he took of it that care which men ordinarily take of their property: See Pothier's Observation Generale, etc., 2 Contrat de Mariage in finem. This is the principle of the Roman and of the common law of England: Jones on Bailment.

The statement of facts admits that the defendant uses his negroes well and takes good care of them; likewise that he used equally well, and took the same care of the slave in question. This establishes the fact that the slave ran away, without any fault on the part of the defendant; but the plaintiff charges that the slave failed to be arrested and recovered by the utter neglect of the defendant. The defendant does not show that he took any step for the recovery of the slave, after he fled. It is true he had the name of the slaves registered with the clerk of the parish court under a provision of an act of the legislature: Martin's Digest, Black Code, n. 26. This precaution would indeed have protected the owners against some liability in case of theft committed by the runaway, but could not lead to his arrest. Towards this it does not appear that the defendant made one single effort; neither did he by warning to the plaintiff, his joint-owner, who was in the city, enable the latter to make any diligence. Most men ordinarily take some steps

to procure the arrest of their runaway slaves. Some advertise them in the gazettes; others think that this step puts the slave on his guard and refrain from advertising; but they seldom neglect to apprise constables, or other fit persons, of the flight, and offer some reward to excite attention. It is true that there are cases in which all this becomes useless; as when the first news of the flight is that of the slave having sailed in a vessel bound to some very distant or unknown port, or to a country from which runaway slaves cannot be recovered. But these are extreme cases. Could the defendant show any like circumstance it would repel the claim of the plaintiff. It is contended that the taking of the steps mentioned is not often susceptible of proof; as when the persons employed to arrest runaways are themselves slaves, and cannot testify. This surely is a difficulty, but orders in such cases might be given in presence or through the channel of free persons. He who is bound to do an act must secure evidence of his performing it, otherwise *de non existentibus et non apparentibus eadem est lex*. We think ourselves bound to say that the plaintiff ought to have recovered.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed and this court doth order, adjudge and decree that the plaintiff do recover from the defendant the sum of seven hundred and sixty dollars, being the nineteen twentieths of that of eight hundred, which appears from the record to have been the agreed value of the slave, between the partners, with costs.

On motion of the defendant, and with the consent of the plaintiff, the judgment is amended, and it is further ordered, adjudged and decreed that the defendant shall be and remain the sole and absolute owner of the slave Dimanche, on the payment of the sum decreed.

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### BLANQUE v. PETTAVIN.

[4 MARTIN, 459.]

**FOREIGN ADMIRALTY SENTENCE.**—The sentence of a foreign court of admiralty is conclusive as to the national character of the ship.

**APPEAL** from the district court. The case states the opinion. *Moreau*, for the plaintiff.

*Duncan*, contra.

By Court, **DEBBIGNY, J.** The plaintiff and appellant, as owner of the brig *James Rinker*, of New Orleans, and her cargo, condemned at Tortola, in the year 1805, brought this action against the defendants and appellees, as underwriters, to recover the amount by them insured. They resist the claim, on the ground that the property was not neutral as warranted. On that question an important question first presents itself: Whether the sentence of a foreign court of admiralty, pronouncing the property captured to be enemy's property, is conclusive evidence of the fact.

This interesting question, after having been several times debated in the courts of the United States, was finally settled by the supreme national judiciary, who pronounced it to be law, that the sentence of a foreign court of admiralty is conclusive evidence of the fact: *Crondson v. Leonard*, 4 Cranch, 434.

It is contended by the defendants, that this decision ought to be given not only in the courts of the United States, but also those of the particular states, because it is grounded upon the law of nations, a law which reigns over the whole of the United States as one natural body, and ought to be construed in the same manner throughout the Union.

On the part of the plaintiff, it is maintained that the decision of the supreme court is not grounded on any of these general principles universally recognized by all nations, but on a rule adopted in England, and prescribed in other countries; that as such it ought not to be considered as an adjudication of what the law of nations generally is on similar subjects, and that its authority ought to be confined to such of the states, the particular laws of which are not repugnant to the adoption of that rule. That there exists here, positive laws, which forbid its introduction, and that the decision of the supreme court of the United States cannot, therefore, be considered as binding in this instance.

It is obvious that the first question to be settled here, is whether or not the doctrine established by the supreme court of the United States, is conformable to the rules of that general system of national justice, which governs the conduct of all civilized nations towards each other. For if we find it grounded on these principles, the consequence must inevitably follow that the authority of the decision ought to be the same over all the Union.

The principle of the law of nations, with respect to foreign judgments generally, is, that when they have been pronounced

by a competent court, they ought not to be inquired into, but ought to be everywhere deemed conclusive between the parties: Vattel, b. 1, ch. 7, art. 84; Martens, b. 3, ch. 3, sec. 20. To this rule a sovereign may refuse his assent, and in that case, the foreign judgment is without force in his dominions. But, if such refusal has not taken place, the sovereign is supposed to have acquiesced in its observance. By an application of this rule to sentences of foreign courts of admiralty, they are deemed conclusive against all the world, because by a fiction of law, everybody is supposed to have been made a party to a suit which is prosecuted *in rem*, and in which all persons interested, are invited to appear as claimants. The limitations and modification to which this doctrine is subject, are considerations foreign to the present inquiry.

The only question here, is whether the principle established by the supreme court of the United States, as to the conclusiveness of sentences of foreign courts of admiralty, be derived from an application of the law of nations to these sentences; and as one can feel no hesitation to say that it has no other origin, enough is ascertained.

Of the extent of authority, which judgments of the supreme tribunal of the country, declaring the law of nations, ought to have, there can be hardly any doubt. Whatever be the jurisprudence of other governments, the United States as a nation, can have but one rule of conduct towards the others. In that code of national rights, called the law of nations, each nation is considered as an individual; the United States are one, the particular states are nothing.

It has been argued that in France the law of nations on this particular subject is not in force; and as Spain is generally governed by the same system of laws which prevail in France, it has been inferred that in Spain also sentences of foreign courts of admiralty are deemed conclusive. We may go farther, and suppose that by the positive laws of Spain such sentences are considered as not existing; and yet this will not make the least alteration in the position here established. For whatever could be the understanding of the law of nations in Louisiana, while under the government of Spain, the moment it was annexed to the territory of the United States it became a part of that body which forms the American nation, which can have but one scale to weigh the law of nations.

We deem it unnecessary to weigh the reasons on which the doctrine established by the supreme court of the United States

is founded. After having said that we consider this decision as binding, we need only refer to it, and pronounce in conformity thereto.

It is ordered adjudged and decreed that the judgment of the district court be affirmed, with costs.

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## SMITH v. KEMPER.

[4 MARTIN, 409.]

**RIGHT OF ACTION TO THIRD PERSON.**—A third person, not being present, but in whose favor a stipulation is made, may avail himself of it.

**PARTNER CANNOT DENY HIS AUTHORITY.**—A partner entering into a contract in the name of the firm, cannot be admitted to say that he was not authorized to make it.

THE case came before the court on a rehearing, the questions raised being, 1. Whether a person, after having created an interest for another, can destroy that interest before the other has signified his refusal to accept it; 2. How far a partner may bind his firm in contracts which, though not contemplated by the articles of copartnership, are entered into for the utility of the firm, and for the better management of its business.

*Livingston*, for the defendant.

*Moreau*, *contra*.

By Court, **DERBIGNY, J.** In the discussion of the first question, the counsel for the plaintiff and appellee have appealed to principles of incontrovertible truth and soundness, but the application of which to the present case is by no means obvious, viz.: That no offer or proposition tending to a contract can be binding on the person proposing until the proposition is accepted, because there can exist no contract without the concurrence and simultaneous will of the contracting parties. To apply this principle to the present case, the counsel for the appellee have been reasoning throughout as if Duplantier, the seller, on one side, and the appellants on the other, were parties to this suit. The case of a merchant proposing to another, by letter, to sell him merchandise at a certain price, and withdrawing his proposition before acceptance, is quoted and relied on as one which bears a strong resemblance to this. Duplantier must, then, be the person proposing, and Smith the person to whom the proposition is made.

But does that agree with the fact? Is there in this case any

feature which warrants the comparison? Surely not. And what are the facts here? Duplantier, the proprietor of the land now in contest between the parties to this suit, made an absolute sale of that land to the partnership of Kemper & Smith. The contract was perfect and complete. The right of Duplantier on the land was conveyed away never to return unless by consent of the purchasers, say of Kemper, at least, and through a regular reconveyance of the property. Duplantier, then, could not retract, and his subsequent attempt to sell again a property which he had already transferred and delivered is a nullity, unless, as we have heretofore said, it is taken as a confirmation of the first sale. The question may therefore be reduced to this. Can the purchaser who has bought for himself and an absent person take the whole bargain for himself, before the absent person has refused to accept?

The strongest authority which can be found in favor of the affirmative, is the Digest, 1, 18, 64. *Fundus ille est mihi et Titio emptus. Quaero utrum in partem aut in totum venditio consistat, an nihil actum sit? Respondi, personam Titii supervacua accipiendam (puto) ideoque totius fundi emptionem ad me pertinere.* By the Roman law nobody could stipulate for a third person without authorization: Inst. 8, 20, 1. *si quis*. Therefore when a stipulation had been made by one for himself and another, if the stipulation was for a thing divisible, as a sum of money, the contract was valid for one half, in favor of the party stipulating, and null as to the other moiety. In the case here presented, it is asked what will be the effect of the sale of an immovable thus made, in favor of two persons one of whom only stipulates, and it is decided that the whole estate is acquired to the party stipulating, because, says Rodriguez in his note upon that law, "the sale is indivisible and cannot be valid for a part only, as a stipulation for a sum of money." The question settled by this law is not, therefore that which arises here; the right of Titus to accept or refuse is not the subject. The validity of the sale is made the question—is it valid in the whole or in part, or is it a nullity? Perhaps this question arose upon a pretension manifested by the vendor to take the property back. But what will be the use of that law? It is not law in this country; the Spanish code, in matters of stipulation in favor of third persons differs altogether from the Roman. By the precise disposition of the Partida, 5, 5, 48, any person may buy for another, and the person in whose favor the purchase is made may avail himself of it, if he pleases.

Subsequent times have gone farther yet. By the law 3, tit. 8, book 3, *del ordinamiento* the *Recopilacion* 5, 16, 2, even pollicitation are made obligatory. "*Hodie tamen, de jure regio bene quaeritur actio illi tertio, et sic corrigitur in hoc Jus commune: ita disponit l. 3 tit. 8, lib. ordinament, imo quod magis est nedum preceedit, quando quis stipuletur illi tertio absenti, sed etiam quando simpliciter et nudà pollicitatione quis promittet absenti, ita aperte disponit praedicta lex. Ex qua bene nota quod hodie in nostro regno ex nuda pollicitatione oritur actio et corrigitur totus titulus de pollicitationibus:*" 2 Gomez, 700. On which article the following comment is to be found, in the additions to the same chapter: "*De Jure regio quemlibet alteri stipulare posse, et ex hujus modi stipulationem directum actionem illi tertio acquiri, ut resolvit Gomez docent Covarubias, Gulhierrez, Matienzo Acevedo, Ceballos et alii communiter,*" No. 3 on the 7 law tit. 11, part 5. The general opinion of the Spanish jurists predicated upon the law 2, tit. 16, book 5, of the *Recopilacion de Castilla*, seems, therefore, to be conformable to that of Gomez; some of them going even so far as to say that if the stipulation in favor of the absent has been made in a public instrument it gives the right of an executory action, *jus exequendi*. Sanches alone is of the opinion that such a stipulation is of no effect before the acceptance of the absent, but even that opinion does not raise a doubt as to the validity of the stipulation; it only contends that the effect of it is not to take place before the acceptance. But independently of any comment, and of any disquisition, what can be more explicit than the law itself? "*Obligado uno a otro por promision o contrato, u. de otro undo, debe cumplir y no puede exceptonar ni que se hizo entre ausenti, ni que no hubo tal estipucion, ni que no fue, ante escribano publico, ni que la obligacion fue hecha a otra persona privada, en nombre de otros ausentes, pues que, constando que se obligo, la ha de cumplir.*"

So much for the stipulations made in favor of a third person, unconnected with any right acquired by a contracting party present. But the subject immediately under our consideration, to wit, a stipulation made in favor of two persons, one of whom only is present at the time of making the contract, is itself particularly mentioned by the same author, in the following article, in a manner that removes all doubts as to the validity of such stipulation in favor of both: "*Dubium tantum est si quis stipuletur copulative sibi et tertio extraneo decem, an ista stipulatio et promissio valeat, de jure communi et jure reigo, et in quo valeat? et breviter dico quod talis stipulatio et promissio intelligitur tantum*

*facta in persona utriusque in solis decem, unde de jure communi valet in persona stipulatoris, pro medietate, et sic quinque; in persona vero tertii extranei erit inutilis; respectu alterius medietatis sibi contingentis in aliis quinque, etc. Hodie tamen de jure regio valeret talis promissio in utriusque persona, per dict, leg. ord. quilibet poterit agere pro medietate."* And in the additions to that number: "*Stipulantem copulative, sibi et extraneo, sibi tantum acquirere promedietate, in alia vero inutilis eam esse stipulationem de jure communi secus vero de jure regio, ut hic resolvitur comprobari facile potest, ex addictis numero precedenti.*"

A right is there given by the Spanish law to the absent person in whose favor a stipulation is made whether that stipulation be for his only benefit, or for the joint interest of him and another person present at the time of the stipulating. In the first case some authors are of opinion that the stipulation is of no effect until it is accepted, though the general doctrine be that such acceptance is not necessary. But in the other case, that in which the obligor has entered into a contract with one of the obligees, no question is made as to the validity of the contract in favor of both and the necessity of an acceptance, on the part of the absent person, for the purpose of giving the contract effect against the obligor, is not even thought of. As to the consequence of a refusal on the part of the absent person, with regard to the party who has undertaken to contract in the name of both, it is not a question to be examined in this case, because, for the reasons adduced in our first opinion, we do not think that any refusal has taken place on the part of the appellant.

Hitherto we have considered the appellee as a person entirely unconnected with the appellant, and having undertaken without any authorization to make a purchase on the account of both. We have seen that even if such was their relative situation, the contract entered into by the appellee would be valid, and would give to the appellant a right to one moiety of the property bought; but when we consider that the parties were partners in trade at the time this contract was entered into, not only the above principles apply to the case with additional force, but others come to their aid which put the claim of the appellant in a still more favorable light.

Partners in trade for the purpose of transacting the business of their concern, are tacitly vested with the necessary power to bind the partnership in all such contracts as are within the sphere of its commerce. Within these limits each partner is considered as the attorney of the others, and whatever he does

is obligatory on them. If he transgresses those boundaries he places himself in the situation of an attorney who exceeds his powers.

But are the acts of the attorney in such cases void *ab initio*? No. They may be made valid by the approbation of the constituent. The attorney says our code cannot go beyond the limits of his power; whatever he does in exceeding that power is null and void with regard to the principal, unless ratified by the latter: Civil Code, 424, art. 24. That doctrine is the same which existed before *Curia Phillipica*, lib. 1, cap. 4, n. 20. The appellant, then, has a right to ratify and accept the purchase of the land which is the subject of this action, and the appellee cannot pretend that because he exceeded his powers in making it, the property belongs to him alone. But can the appellee be permitted to say that he exceeded his powers? Can he object to the validity of his own acts? Powers of attorney may be given by instruments under private signature, and even by letters. They are the title of the attorney against his constituent, to prove, should it be denied, that he acted with due authority, and to make the constituent responsible for what he has done by his order. But the constituent retains no voucher of his authorization. If it should be permitted to the attorney, after having contracted in the name of his principal, to say that he was not authorized, he might, should the bargain turn out an advantageous one, apply it to his own benefit. To that effect it would be sufficient to conceal or destroy the evidence of his authorization. So between partners (and be it understood that we have seen nothing in this case that would justify any allusion to the parties). Independently of the powers derived under the articles of partnership, authorization may be given by one to the other, by letter or otherwise; and if the partner thus authorized should wish to enjoy alone the benefit of any advantageous transaction made under such authorization, nothing would be more easy for him than to secure it. These reflections are made with the only view to show how just is the rule which does not admit a party to contradict his own deed—a rule which applies here with particular force; for the act of the party imports the confession of a fact, the proof of which may be in his power alone. We are of opinion that the appellee, after having stipulated in his contract, in the name of the partnership cannot be admitted to say that he was not authorized to that effect.

For these reasons, in addition to those already expressed in

our first opinion, we should think that the judgment rendered in this case ought not to be disturbed; but as it further appears to us, that at the commencement of the suit before the Spanish governor of Baton Rouge, as mentioned in the proceedings in this case, the premises were in the hands of the appellee as part of the partnership stock, and the proceedings in said suit before the Spanish governor, whereby the appellee was dispossessed, appear irregular and illegal.

It is ordered, adjudged and decreed, as the judge of the fourth district ought to have decreed, that the appellee be restored to the possession of the said tract of land, as described and set forth in the proceedings in this case, to be held by him as part of the joint stock of the late partnership between him and the appellant, John Smith, until the final settlement and payment of the accounts of said partnership. And that a mandate do issue from this court to the fourth district for the parish of Pointe Coupee, desiring the said court forthwith to issue the proper writ to put the appellee in possession of the said tract of land accordingly.

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As to the right of action by a third party, see *Schermhorn v. Vanderheyden*, 3 Am. Dec. 304, and note.

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### BORE v. QUIERRY.

[4 MARTIN, 545.]

**RECORD OF FORMER SUIT.**—The record of a former suit between the parties is admissible in evidence, notwithstanding such suit was dismissed.

**APPEAL** from the district court. The plaintiff and appellant was the executor of Mary Bore, a free woman of color, who was alleged to have been for a number of years in partnership with one Quierry, the defendant's testator. The suit was brought to recover one half of the property left by Quierry. The answer stated that the plaintiff's testatrix was not a partner of Queirry's, but merely a servant, and that as she had lived as a concubine with him, the suit could not be maintained. During the trial the defendant offered in evidence the record of two suits, instituted by the plaintiff's testatrix, against the present defendant, for the purpose of showing that she was the servant of the testator. The plaintiff objected to the introduction of these records in evidence, and the objection being overruled an exception was taken. The records introduced as evidence by the de-

fendant, and objected to by the plaintiff, were those of two suits instituted by the testatrix of the former against the latter, to recover her wages as a servant, during all the time which she lived with his testator, and those of two female slaves of hers. The first suit was dismissed as premature, and the second was withdrawn, since his death by his executor, the present plaintiff, "in consequence of an agreement between the parties, and whereby it was understood, that upon the discontinuance of said suit, the defendant should pay to the plaintiff a legacy of fifteen hundred dollars, left to his testatrix by his testator, which was accordingly paid."

*Carleton*, for the plaintiff. It is a well established principle in law, that whenever a cause is dropped for want of prosecution, or goes off on any other point than its merits, the judgment rendered therein, or the allegations of the parties in the pleadings, cannot be read in evidence, or converted to their prejudice in a subsequent suit. A party often suffers a non-suit, or discontinues his cause, when he discovers the grounds he had taken were untenable. A client speaks and acts through his attorney, who may misconceive the nature and form of his action: 4 Bac. Ab. 107; 3 Id. 679; Chitty, 195; Peake's Ev. 254.

*Sedgers*, for defendant, claimed there was no error in admitting as evidence the records of the two suits instituted by the plaintiff's testatrix. These two suits disclosed two facts which cannot exist with that alleged in the petition in the present case. The confession or acknowledgment of facts made by the parties by their counsel in their pleadings, are evidence, and must be admitted as such in any action against them: 2 Pothier, Oblig. No. 797.

By Court, *DERBIGNY, J.* It has been contended generally that the record of a suit, in which the plaintiff has been non-suited, cannot be produced against him, either for the purpose of estopping him, or as evidence of facts by him acknowledged. We do not indeed believe that the doctrine of estoppel, as known to our laws, extends to the length which the defendant contends for. In order that a demand may operate as a bar against another, it must appear that, by the first, all right to the second have been waived. But, although it must be confessed that it is not easy to reconcile a demand of wages as a servant, with a claim as a partner, the one does not of necessity exclude the other. Actions contrary to one another, although they cannot be united in a libel, may be separately instituted

*quando sunt talia jura, quæ non tolluntur electione*, says Lopez, n. 1, part. 3, 10, 7.

But the plaintiff has not only contended that these records could not be introduced in support of the defendant's plea in bar, he has also attempted to show that they could not be produced as evidence of facts acknowledged by his testatrix. To establish this point, he has quoted from Part. 3, 22, 9, a passage which goes to say that after a defendant has obtained the dismissal of a suit, owing to the absence or neglect of the plaintiff, it shall not be permitted to the plaintiff thereafter to avail himself in a new action of anything written in the first, because the defendant has been liberated of that by the judgment of dismissal. But this provision, denying to the plaintiff the right of producing in such a case the pleadings of the first suit, is certainly not applicable to the defendant. We do not presume that the plaintiff further intended to deny generally, that the acknowledgment of parties, by their attorneys in the pleadings are evidence. "The confessions or acknowledgments," says Pothier, "which the parties make in several stages of a suit, by their instruments of writing or pleas, may also pass for a sort of judicial confession, when the attorney has authority from his client to make them, and he is presumed to have such an authority as long as he is not disavowed:" 2 Pothier's Obl. N. In Gilbert's Law of Evidence, chap. 3, sec. 3, it is said: "The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true, nor shall it be preferred by the counsel or solicitor, without the privity of the party, and therefore it is evidence as to the confession or admission of the truth of any fact by the party himself." In this particular instance, the soundness of that doctrine is manifest; for here is the disclosure of an all-important fact, the proof of which was perhaps in the power of the plaintiff alone, to wit, her possessing two slaves in her own right, during all the time of her residence with Quierry.

Upon the whole we think that the records offered in evidence by the defendant were properly admitted, so far as his object was to establish facts disclosed by the plaintiff. We have in support of the partnership acknowledgments of Quierry made, it is not said at what time, and in opposition to them his own acts and the acknowledgments of Martha Bore. Independently of her own avowal that she was only his servant, we have it in evidence from her own mouth, and that of one of her witnesses that he possessed land in his own right, and she two

slaves in hers. A universal partnership between them is then out of question; and if there were a particular one, nothing shows in what it did exist.

We are therefore of opinion that the plaintiff's claim is not supported by the evidence; this will preclude the necessity of inquiring here how far these can exist in the state of any such thing as a partnership between a man and his concubine, particularly between a white man and a free woman of color, living together in concubinage, and how far such a contract may come within the provisions of the Part. 5, 11, 28, and the thirty-third article of our Code, 264, which declares void all contracts the cause of which is contrary to good morals and public order. It becomes also unnecessary to decide whether the plaintiff could bring this, or any other action against the estate of Quierry, after having consented to withdraw the suit for wages, for the purpose of receiving the legacy left to his testatrix; although it may be proper to observe we were inclined to view this agreement as a compromise intended to put an end to his claim. It is ordered and adjudged and decreed that the judgment of the district court be affirmed with costs.

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As to how far records of a former suit can be admitted in evidence, see 1 Greenleaf on Ev., sec. 195. In *Putnam v. Day*, 22 Wall. 60, a statement in a petition by an attorney was received in evidence against his principal. In *Warfield v. Lindell*, 30 Mo. 272, it was held that the declarations of a party as to his title to property in controversy made in the pleadings in a prior suit between him and another party, are admissible against him as evidence in favor of a person not a party to that suit. So a sworn statement filed in the court of claims by a government contractor as to the amount of grain left on his hands by a quartermaster was held admissible against him in an action against a carrier for unreasonable delay in forwarding: *Illinois Cent. R. R. Co. v. Cobb*, 64 Ill. 143.

CASES  
IN THE  
SUPREME COURT  
OF  
VERMONT.

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WARNER v. WHEELER.

[1 D. CHIPMAN, 159.]

**RESCISSION OF CONTRACT.**—In some cases the purchaser of property may, at his option, on account of fraud practiced by the seller, rescind, and by action of *indebitatus assumpsit* recover back the price; or by an action of deceit or other proper action recover his damages; but he can, in no case, maintain *indebitatus assumpsit* for the purchase-money, without a previous offer to rescind and a demand of repayment.

**ASSUMPSIT** on a contract for an exchange of horses. Plea, the general issue. The declaration stated that on the twenty-fifth day of November, 1810, at —, the plaintiff, at the special instance and request of the defendant, delivered to him a certain gray mare, which was well and sound, and of the value of one hundred dollars, and paid him five dollars in cash as boot; that the defendant delivered to the plaintiff, in exchange, a certain sorrel mare which defendant then and there warranted as sound and free from disease or blemish, but that said sorrel mare was at the time wholly unsound and of no value, having a disease commonly called consumption, which was known to the defendant and wholly unknown to the plaintiff, and that she died of said disease; whereby the plaintiff wholly lost the said sum of one hundred dollars, the value of said gray mare, together with the said sum of five dollars paid as boot. The declaration then proceeded, "Whereupon the defendant became liable to pay to the plaintiff the said sum, being one hundred and five dollars, and being so liable did assume," concluding in the usual form of *indebitatus assumpsit*. At the trial the counsel for the defendant objected that the action, being in substance

an action of *indebitatus assumpsit*, could not be maintained, unless the plaintiff had a right to rescind, and had in due season offered to do so and to return to the defendant what he had received. The court overruled the objection, and the jury having returned a verdict for the plaintiff, the defendant moved for a new trial, with leave to move in arrest of judgment should a new trial be refused.

*Aldis*, for the plaintiff.

*Van Ness*, for the defendant.

By COURT.\* It is settled that, on a contract for the sale of property, an action of *assumpsit* will lie, on a warranty made at the time of sale, or an action of deceit for a fraud in the sale. And there are cases where, from the fraud practiced by a seller, the purchaser has a right to rescind and demand back the consideration paid. And, in such cases, it is always at the option of the purchaser whether he will rescind the contract or affirm it, and seek redress by an action of deceit, or some proper action, to recover his damages. But if the purchaser choose to put an end to the contract, and, in an action of *indebitatus assumpsit*, to recover back the consideration paid, he must, in due time, offer the seller to rescind the contract, and demand a repayment of the purchase-money.

In this case it does not appear that the plaintiff has ever offered to rescind the contract, or demanded a repayment of the purchase-money. There is, therefore, no doubt that, in this case, *indebitatus assumpsit*, either for money had and received or for goods sold and delivered, cannot be maintained; and the only question is, whether this is an action on the warranty to recover damages, or an action of *indebitatus assumpsit* to recover back the consideration. The court gave no opinion whether the declaration be good or sufficient on either ground. But they think the declaration is to be considered as in *assumpsit* on the warranty. The plaintiff properly gave evidence of the damages which he had sustained by the unsoundness of the horse which he received in exchange. In doing this, it was unavoidable to take into consideration what he gave in exchange. The motion for a new trial cannot prevail.

Van Ness then filed a motion in arrest of judgment for the insufficiency of the declaration, and the cause was continued for the term.

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\*The court at this time was composed of Nathaniel Chipman, Daniel Farrand, and Jonathan H. Hubbard.

## MEACH v. PERRY.

[1 D. CHIPMAN, 182.]

**SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.**—In a suit for the specific performance of a contract for the sale of lands, the defendant may avail himself of the statute of frauds, either by plea or demurrer, except in certain cases, appearing on the face of the bill.

**PART PERFORMANCE.**—Such case is not taken out of the statute by part performance unless such part performance be expressly stated in the bill, and be made under circumstances amounting to a fraud, against which a court of equity will relieve.

**EQUITY.** Bill against the administrators of Israel B. Perry, deceased, for the specific performance of a contract for the assignment of a certain lease. Plea, the statute of frauds, and that the estate of said Perry is insolvent. The case is sufficiently stated in the opinion.

*Harrington and Van Ness*, for the plaintiff.

*Robinson*, for the defendant.

By Court, CHIPMAN, C. J. The bill in this case is very diffuse, and is very inartificially drawn. The practice, which has too much prevailed, has been pursued in this case—the practice of setting out long instruments in writing *in hæc verba*, instead of pleading the legal effect of such instruments, which is the only correct mode of pleading. Thus a few lines may supply the place of whole pages, and be much more clear and intelligible; it is something worse than a useless incumbrance on the record.

The object of the bill is to obtain a specific performance of an agreement, stated to have been made between the plaintiff and Perry, the intestate, for the assignment of a lease of a farm in Charlotte, for a long term of years, by Perry to the plaintiff, or rather to obtain a decree for an assignment of the lease, a delivery of the possession of the premises, and a foreclosure; as it is stated, that the assignment was to have been made by way of mortgage, to secure the payment of a sum of money, by Perry to the plaintiff, by a certain day which has long since past.

The defendants have pleaded the statute regulating conveyances of real estate, and for the prevention of frauds therein in bar, avowing that there was no agreement in writing signed by the parties or either of them, and have answered to the insolvency of the estate of Perry only, setting forth briefly the proceedings in the settlement of said estate, and offering to pay the plaintiff his dividend when it shall be made out by the judge of

probate. Exceptions are taken to this plea which rest on two grounds. First, it is contended to be an established principle that such parol agreement, if confessed by the defendant, is not within the equity of the statute, and the court will give relief on such agreement so confessed; if the agreement be denied, the case is within the statute and the court will not grant relief; that the defendant is compelled to answer and either deny or confess the agreement. Secondly, it is contended that this, as appears on the face of the bill, is a case of part performance, or a case of a performance on the part of the plaintiff, which has always been considered as a case excepted out of the statute.

It is true, as stated by the plaintiff's counsel, that our statute, pleaded by the defendant in this case, is the same as the British statute on the same subject; and the cases arising under it will embrace the same principles of decision. It is, therefore, proper and necessary to examine the English authorities on the points to be decided.

Very soon after the passing of the British statute, specific relief, on a parol agreement for the sale of lands, was decreed on the confession of the defendant in his answer; and it was said that as the statute was made for the prevention of frauds and perjuries, it did not extend to a case where the defendant confessed the agreement in his answer; that there was in such case no danger of perjury, so not within the statute. This was adopted as a rule in chancery; and, as observed by Lord Thurlow in the case of *Whitechurch v. Bevis*, Bro. C. C. 558, "the rule seems to carry a necessary conclusion that whatever in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from disclosing." Now, to carry the rule to this extent is to annihilate the principle on which the statute was founded. For, while by excluding parol proof of the agreement, the danger of perjury, as far as relates to witnesses, is removed, the temptation is accumulated on the party. The defendant is to be compelled to answer under the strongest bias of direct interest, since, by denying or essentially varying the agreement, he may acquit himself of the demand; for no parol proof can be admitted to contradict him. It was impossible to support the rule to that extent. The principle has since undergone repeated discussion, and has been limited and finally settled by a course of decisions in the highest tribunals in that country.

It has been decided that the defendant pleading the statute is not compellable to answer respecting the agreement, unless

it be a case of part performance appearing on the face of the bill. The principal cases are: *Whaley v. Bagnal*, 6 Bro. P. C. 45; *Whitechurch v. Bevis*, 2 Bro. C. C. 558; *Jordan v. Sawkins*, 3 Id. 388; and *Redding v. Wilkes*, 3 Id. 400.

The case of *Whitechurch v. Bevis* was decided upon great consideration and a full investigation of precedents and principles. It was a bill for the specific performance of a parol agreement for the purchase of a house. A part performance was alleged in this, that the attorney employed had received instructions, both from the plaintiff and the defendant, to prepare the conveyances, and had made a minute of the terms on which the sale was to proceed. The minute was: "Mr. Bevis agrees to convey the house (describing it) in consideration of forty pounds per annum: Mr. Whitechurch to take the stock at a fair appraisement." That the parties agreed to deliver the title-deeds to Chub, the attorney, to prepare the conveyances, and then deliver them to one Maynard, as a trustee for the purpose of securing the annuity (the rent of forty pounds). The bill stated further, as a part performance, that the parties had fixed on a person to value the stock, and that the plaintiff had, with the privity and consent of the defendant, entered into articles with a third person, one Webb, to grant him a lease of the premises as soon as he should be in possession.

To this bill the defendant pleaded the statute of frauds both to the discovery and to the relief, but did not aver in his plea that there was no parol agreement; and his answer only went to the part performance and did not deny the parol agreement. Exceptions were taken to the plea, and there were three solemn arguments before it was finally decided. The first exception to the plea was, that it was a case of part performance, so stated in the bill, and therefore, according to the uniform course of decision, excepted out of the statute. But the chancellor decided that none of the facts stated in the bill amounted to a part performance, there was, therefore, nothing in this exception. The second exception was that if the defendant had confessed the agreement it would take the case out of the statute, and the plaintiff would be entitled to a decree; he must, therefore, answer to the agreement, and either confess or deny it. After two arguments, the chancellor was not fully satisfied; he, therefore, overruled the plea, and ordered it to stand for an answer, with liberty to except, and reserved the benefit of the plea to the hearing. It appears that the defendant had, by a further

answer, confessed the agreement. The plea was again argued on the exception.

The chancellor, Lord Thurlow, observing on the rule respecting the defendant's being compelled to answer, to wit, whatever in conscience affords a title to the plaintiff, it is impossible to exempt the defendant from answering, goes on to say, "the cases have been uniform in this point only; where the defendant has pleaded the statute of frauds, and has not confessed a written agreement, the court has, in no instance, deemed an execution of the agreement. The case of *Whaley v. Bagnal* was so determined upon great argument, in the year 1768, and has fixed the rule upon a basis of authority a great deal too strong to be overturned or answered. I have, therefore, with great deliberation, turned over the cases cited; and all I can find are two cases, in which relief has actually been obtained contrary to the statute of frauds.

The first case was decided before Lord Mansfield, in the year 1723, *Child v. Godolphin*, where it was held that the plea should stand for an answer. The other, *Cottingham v. Fletcher*, where the defendant in his answer admitted a trust, and it was decreed that the trust should be executed, notwithstanding the statute. The *dicta* are as frequent as the cases, and, therefore, it appeared to me necessary to examine that branch of the practice which relates to the confession of an agreement not in writing, notwithstanding a plea of the statute. I should think it a matter not so much to be supported by a plea as to be demurred to, because the statute says that "an agreement not in writing shall not avail." After some further observation on the propriety of a demurrer in such case, he proceeds: "In the present decision I go no further than the cases before mentioned, analogous to the case in Ireland, *Whaley v. Bagnal*, but a great deal stronger upon the point upon which my opinion rests. That case applies to a great variety of transactions, and admits that the agreement was not reduced to writing, but insists on a part performance. The bill was filed and merely a plea of the statute put in; no answer, only an averment that no writing was signed by either of the parties. The counsel on both sides agreed in the law, according to the reason given, on both parts of the case; for, in that case, the single question was whether the plea sufficiently covered the facts stated in the bill. But it was said that those facts amounted to a part performance. And the house of lords were of opinion that, upon the face of the bill, it was no part performance." Accordingly, in the principal case, Lord Thur-

low overruled the exception, the plea was allowed and the bill dismissed, although the defendant had, in his further answer, confessed the agreement.

The case of *Jordan v. Sawkins*, so far as relates to the present question, was a bill for a specific performance of a parol agreement for a lease of a public-house, stating certain facts as a part performance. The statute of frauds was pleaded without any answer to the parol agreement. Lord Chancellor Thurlow held the facts stated as a part performance not to be such, and allowed the plea.

The next case was that of *Redding v. Wilkes*, in the same year. This was a parol agreement within the statute of frauds. Certain facts stated were relied on as a part performance. The defendant demurred alone, probably relying on what was thrown out in the case of *Whitechurch v. Bevis*. It was held by the chancellor that the facts stated in the bill and relied upon as a part performance did not amount to part performance, and he allowed the demurrer.

It is, then, established, notwithstanding a contrary opinion may still be maintained by the collectors and epitomizers of cases decided in the early times of the British statute, and even by some text-writers of eminence, that the defendant in such cases may avail himself of the statute either by plea or demurrer, unless in certain excepted cases appearing on the face of the bill. I say certain excepted cases, because I think it probable that the case of part performance may be found not to be the only exception.

Where redress is given in cases of part performance, the true ground on which it is given is that of fraud. Not that kind of fraud which consists merely in the non-performance of a promise, but something more. For instance, the vendor of an estate in land, by parol agreement, which, simply as such, he would not, taking advantage of the statute, be compelled to perform, suffers the vendee, in confidence of the agreement, to go into possession and lay out his money in repairs and improvements on the purchased premises, and then refuses to fulfill the agreement, it is, and in great justice, considered to be a fraud, a fraud of that kind which gives a court of equity jurisdiction of the whole case, with all its circumstances. It is examined as a fraud, and the agreement is produced, not merely as an agreement, but as the instrument and means of the fraud; and a specific performance of the agreement is decreed, as the only way in which the person so defrauded can have full and ade-

quate redress. Therefore, although the case of part performance has been treated as an exception out of the statute, yet it more properly belongs to the class of frauds than agreements. It is a fraud practiced under pretext of an agreement. But in cases of part performance of parol agreements, to whatever class they may belong, a plea of the statute is not to be allowed. The part performance must, however, to oust the defendant of his plea, appear distinctly on the face of the bill.

In all the cases which I have been able to find, the facts insisted on as a part performance have been expressly so alleged; so were all the cases which have been cited; and also the case of *Whitbread v. Wainwright*, 1 Bro. C. C. 404, in which the plea of the statute was overruled, because it was multifarious. It is not, however, at present decided to be absolutely necessary that part performance be expressly alleged in the bill; it may be enough that sufficient facts are stated. But, at any rate, it must appear on the face of the bill to be such a case.

There is in this bill no express allegation of any facts as a part performance. Are there any facts sufficient to support such allegations? The statement is, briefly, that on the first day of October, 1807, Perry, the intestate, applied to the plaintiff for a loan of money, and proposed, as a security, to make an assignment of a lease, as already stated; that, induced by and relying on this proposition, (promise it is cited in the bill), the plaintiff advanced him, by way of loan, nine hundred and seventy dollars and fifty-six cents, for which he took Perry's promissory note, payable at the end of three years with interest, that is on the first day of October, 1810; and Perry faithfully promised the plaintiff to assign to him that lease, by writing under his hand on the back of the same, as security for the punctual payment of the principal and interest of the note, on the first day of October, 1810, on the plaintiff's promising that, on punctual payment the lease and assignment should be delivered up to Perry; and, if the money should not be paid by the day, the plaintiff was to go into quiet and peaceable possession of the premises contained in the lease.

To understand the matter fully, it may be necessary briefly to analyze the transaction: Perry made a proposition to the plaintiff, that if he would loan to him a certain sum of money, he, Perry, would assign to the plaintiff a certain lease by way of security. It is stated as a promise, but it is, in its nature, merely a proposition; something held out as an inducement to an agreement. And we see that the final agreement was variant

from, and extended beyond, the terms of the proposition. The plaintiff advanced, on loan, to Perry, nine hundred and seventy dollars and fifty cents, upon Perry's promissory note, payable at a future day. Then follows the agreement, or promise, on the part of the defendant, to assign the lease under the stipulation before stated. The consideration for the promise was the loan so advanced by the plaintiff. Now, to consider it as an agreement for the sale of the interest in the term, the whole purchase-money was paid by the plaintiff, the vendee. How far has such payment been considered as part performance? In *Lacon v. Martin*, 3 Atk. 2, the purchaser having, on a parol agreement, advanced several sums, for part of which he took a bond in the meantime, Lord Hardwicke, upon all the circumstances, decreed a performance.

In *Pengal v. Rose*, on a parol agreement for a lease for twenty-one years on a fine of one hundred and fifty pounds, the purchaser paid one hundred pounds, and the vendor gave directions for making a lease; it was held not to be such a part performance on one part as to authorize the court to decree a specific execution. There are several cases to be found, on the same subject, equally at variance.

In this case, as in all the cases of part performance, a ground of fraud ought to be laid to entitle the plaintiff to relief. Had this principle been first adopted and steadily adhered to, instead of placing it on part performance, depending upon acts which frequently are, and must be equivocal, affording proof of fraud or not, according to the attending circumstances, I am of the opinion we should not have found so many apparent inconsistencies in the decisions of these cases. The question never ought to have been: Is it a case of part performance? But does the part performance, with the attending circumstances, make a case of fraud, against which a court of equity ought to relieve? On this principle I have considered the present case, and taking the whole statement into consideration, I am not able to make it a case of fraud.

But let it now be considered what it really is, an agreement for a mortgage of real estate—a collateral security for money lent. The advance of the money by the plaintiff to Perry, the intestate, on his promissory note, was the consideration. Here is certainly a good, valuable and legal consideration for the agreement. No agreements, made without consideration, could ever have been enforced, either at law or in equity. Such agreements needed not the passage of the statute; it was not intended

to apply to them, but to certain agreements which were good and valid before the act—to all parol agreements for the sale of lands, tenements or hereditaments, or any interest therein or concerning them, upon whatever good, valuable and legal consideration they might be made. To give it a different construction would be, in effect, to repeal the law. But, it may be said that this is a case of a contract executed. That, indeed, will liken it to a case where the purchase-money has been paid. It certainly goes no farther; and it admits, to me, the conclusive answer—no fraud is suggested in the bill, other than the general allegation, which is well answered by a negative as general. Nor do the facts stated in the bill amount to a fraud.

No time was appointed for the execution of the assignment, but the legal construction of the contract is that it was to be done in a reasonable time, on request of the plaintiff. It is very evident, from a perusal of the bill, that it was the intention of the parties that, in failure of payment, possession should be delivered to the plaintiff, and the property become vested in him absolutely and irredeemably. A failure was intended to operate, not merely as a forfeiture at law, as in case of a mortgage, but of all right and equity of redemption. Now, had this agreement been reduced to writing, and a bill had been brought to compel an assignment, the court would not have decreed it agreeably to that intention. Forfeitures are odious, particularly in a court of equity. An assignment might have been decreed, but with a defeasance, to operate as a common mortgage. This would have reserved to the assignor a valuable interest—the equity of redemption—of which he could not be deprived but by a regular foreclosure. Not, that, had the agreement been carried into effect agreeably to this intention between the parties, it could have been set aside. It is one of those hard cases, not amounting to fraud, in which a court of equity would not interfere—neither, in the first instance, to carry it into effect, nor, in the second, to set it aside.

It does not appear that the plaintiff made any demand of Perry, the intestate, to make the assignment, until the first day of October, 1810, the day on which the note became payable. It is stated that “on that day Perry, having hitherto neglected to pay the money due on said note, though often requested, then wholly refused to make said assignment, and your orator then and there—to wit, at Charlotte aforesaid—demanded of the said Perry to complete said assignment, and to give possession to your orator, or to pay the said sum of money contained

in said note." These are the words of the bill. The demand of the possession, here coupled with a demand of the assignment to be made, was clearly premature. Perry had the whole of that day to pay the money. But it serves to show the plaintiff's understanding of the agreement—that the property was irredeemable. There was no offer of any condition of redemption, or to take the property in satisfaction of the money due on the note. In this connection, the plaintiff had not a right to that which he demanded. I am still speaking as though it had been an agreement in writing. And, taking the demand of an assignment as standing by itself, the plaintiff was not in equity entitled to it, without the offer of a clause of redemption to be inserted. And Perry might refuse to do that which equity would not compel him to do.

But it is not alleged that Perry refused to comply with the demand; it is nowhere averred that he did not make the assignment, or pay the money on the note, either then or at some future day during his life. It is stated that there was a neglect and refusal before and up to the time of the demand; but there can be no transposition in this case, much less can such averment be dispensed with.

These observations are intended to apply only to the point under consideration—the question whether there appears in the case, as stated, any fraud which can entitle the plaintiff to proceed on parol proof of the agreement, as a case of past performance, as it is called—a case excepted out of the statute. Nothing of the kind can be discovered.

I will observe one thing further (it has not had, as it ought not to have, any influence on any part of the opinion in the case), that this is not wholly a case of parol agreement. The promissory note was a part of the agreement, and was in writing, signed by one of the parties, Perry. So that, on the appearance of the note, the plaintiff could not, agreeably to the rules of evidence, which are as strict in this point in a court of chancery as a court of law, be permitted to go into parol proof of any further agreement. On the whole, the plea, both upon authority and principle, must be allowed.

## BROWN v. BEBEE.

[1 D. CHIPMAN, 227.]

**PAROL EVIDENCE—PATENT AMBIGUITY.**—The omission in a promissory note of the sum to be paid, is a patent ambiguity, which cannot be explained by parol, but the payee must resort to the original contract, treating the note as a nullity.

**CERTIORARI.** Action on a promissory note in the following form: "Sixteenth of March, 1812. For value received, I promise to pay Jonathan Brown sixteen, on the first day of May next, with interest. (Signed): Aaron Bebee." The declaration averred that the word "sixteen" in the note, meant sixteen dollars; and at the trial the plaintiff offered to prove that such was the meaning by parol evidence, which the court refused. The plaintiff excepted, and brought the case here by writ of error.

*Strong and Mallary*, for the plaintiff in error.

*Langdon*, for the defendant, cited *Peake's Ev.* 82.

By Court, CHIPMAN, C. J. The rule certainly is, as laid down by the defendant's counsel, that parol proof cannot be admitted to explain, extend or vary a written contract. There is but one exception, if it may be called an exception, that is, in the case of a latent ambiguity. As in the case, usually put, of a devise to A.; there are two persons by the name of A., father and son; this, appearing by parol proof, introduces an ambiguity as to the person intended by the testator. But, as the ambiguity is not apparent on the face of the devise, it is called a latent ambiguity, and, as it is raised by parol, it may be explained by parol. But where there is a devise of fifty thousand dollars, wholly omitting to name any devisee, this is a patent ambiguity, which cannot be explained by parol.

But it is said that this is a mistake, and that mistakes are allowed to be rectified. There are cases in which a court of chancery will correct a mistake, or rather compel the party to correct it, by supplying what was omitted by mistake; but this does not belong to a court of law.

But, in simple contracts, a party is rarely without remedy in a court of law. As, in the present case, the note through an omission being void or ineffectual, the plaintiff may resort to the original contract. He may sue on the original cause of action and recover the demand for which the note was intended to be given. Had the plaintiff in this case added a count appli-

cable to the original contract, he might have recovered what was his just due; he still may have that remedy.

But in this action brought on the note, the county court were right in rejecting parol evidence to prove what the note should have been, or how it should have been written; the decision is supported equally by precedent and the soundest principles. In an action on a note the plaintiff is entitled to recover by proving only the execution of the note; from the solemnity and certainty of the instrument, it affords evidence of the contract, the consideration, and of everything which is necessary to entitle the plaintiff to recover. To give this effect to a note, and yet allow the plaintiff to supply any defect in the note by parol testimony, or, in other words, to prove what the note should have been, as agreed between the parties by parol, is perfectly inconsistent; it would be to give the plaintiff all the benefit of a written contract and yet permit him to prove the contract by parol testimony.

The judgment of the county court must therefore be affirmed.

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## DUPY v. WICKWIRE.

[1 D. CHIPMAN, 237.]

**RETROSPECTIVE ACT VOID.**—An act of the legislature directing a certain deposition to be read in the trial of a cause then pending, is retrospective in its operation, and is in the nature of a judicial decision. It is, therefore, void.

**DEBT**, for three hundred dollars, brought by the plaintiff, suing for himself as well as for the town of Readsborough, under an act providing for the support of the poor, against the defendant, for transporting to the town one Jacob Morse, a pauper, who had no legal settlement there. At the trial, the plaintiff offered the deposition of Jacob Morse, in the caption of which the cause in which it was to be used was entitled an action in which Joshua Dupy was plaintiff and Reuben Wickwire defendant, omitting the *qui tam*, it appearing that the said Morse had died pending the action. The court below rejected the deposition. Subsequently, the defendant procured an act of the legislature directing the said deposition to be read in any future trial of the action, notwithstanding the irregularity in the caption. The sole question was as to the admissibility of the deposition.

*Wright*, for the plaintiff, cited 2 Hawkins, 379.

*Fay*, for the defendant.

By COURT. If the plaintiff be entitled to read the deposition in this case, he is not entitled to read it by virtue of the act of the legislature. The act is most clearly unconstitutional and void. It is an attempt of the legislature to make a judicial decision in a particular case; but the constitution of this state prohibits the legislature from the exercise of any judicial powers. The act is also retrospective in its operation, is rather in the nature of a legislative sentence, order, or decree, than of a law. Besides, if the deposition was not legally taken in this case, it is a mere voluntary affidavit. And the person making such voluntary affidavit does not subject himself to the pains and penalties of perjury for any false swearing in such affidavit; it is not taken, therefore, under that security to which the person against whom it is to be read is entitled, nor can any *ex post facto* law give that security. Suppose this deposition to have been false in some material fact, and that Morse was not dead, but gone to some parts unknown, and, by virtue of this act, his deposition read and a verdict obtained against the defendant, and Morse should return, could he be convicted of perjury for swearing falsely in giving the deposition? Certainly not. Even if the legislature should have specially provided that the deponent should be liable to all the pains and penalties of willful and corrupt perjury for false swearing, such *ex post facto* provision would have been void, as being against the constitution of this state, the constitution of the United States, and even against the laws of nature. The deposition, therefore, cannot be admitted on the authority of the act of the legislature.

But the court, on consideration, are of opinion that the deposition is legally taken. It seems to have been settled that the person suing in such case may bring the action in his own name only. In England the writ may be brought *qui tam*, and the declaration be in the name of the person prosecuting only, and that there is no necessity that the writ or declaration should express the *qui tam*. The person prosecuting may well be considered as the sole plaintiff. The title of the action given in the caption of the deposition is sufficiently correct.

Let the deposition be read.

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In *Langdon v. Strong*, 2 Vt. 234, a statute authorized an administrator in a certain case to convey lands to the creditors in payment of their debts, the lands to be appraised, and a deduction made from the appraised value, not exceeding twenty-five per cent. This was held constitutional; but it would be otherwise if the statute had been mandatory. The authority of the principal

case came under the consideration of the court, regarding which it is said: "The objection to this act is, that it interferes with the vested rights of the heirs, and is a judicial act, belonging in its nature to the probate courts. The counsel endeavor to assimilate this to several acts decided void by this court. They cite *Dupy v. Wickwire*, 1 D. Chip. 237. The amount of the decision in that case is, that an act, which was in the nature of a *mandamus* to the court, requiring the admission in evidence of a deposition already in existence, and rejected by reason that the caption did not describe correctly the parties to the action, was void and not binding on the court. This act is liable to the two objections of being a judicial act, and varying the rights secured to the parties in the action by the general laws."

This subject, of the power of the legislature to act judicially, is treated by Judge Cooley with his usual fullness and accuracy: Constitutional Lim. 94. He says: "As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial,' [citing *Dash v. Van Kleeck*, 5 Am. Dec. 305.] If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous and suitable that could have been adopted. If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. And as a court must act as an organized body of judges, and, where difference of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members."

The principle on which the constitutionality of such legislation is determined may be thus stated: If an act of the legislature, in terms, judicially determines a question of right or of property, as the basis upon which the act is founded, so far the act must be regarded as a judicial act, and therefore unconstitutional. But if it simply authorizes the doing of an act with the view of attaining a given end, or accomplishing a particular result, without any determination of the fact of the existence of that which secures to a party a right to the fruits of the act, it is not liable to this constitutional objection. *Smith Stat. and Const. Law*, sec. 347. And affirming this doctrine, see *Merrill v. Sherburne*, 1 N. H. 199, per Woodbury, J.; *Jones v. Perry*, 10 Yerg. 59, 69; *Watkins v. Holman*, 16 Peters, 25, 60, per McLean, J.

This question has arisen in reference to legislative divorces; the subject of

which is treated in 1 Bishop, on Mar. and Div., sec. 680, *et seq.* In sec. 686, this author concludes that "the granting of divorces by the legislature is not such an exercise of judicial authority as will render them invalid;" and he notices exceptions in Missouri: *Bryson v. Bryson*, 17 Mo. 950; and Ohio: *Bingham v. Miller*, 17 Ohio, 445, but under some special constitutional provisions in these states.

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## STARR v. ROBINSON.

[1 D. CHIEFMAN, 297.]

**OBLIGATION OF CONTRACT.**—A special act of the legislature, freeing the body of a debtor from imprisonment, and providing that "all such bonds as have been taken by the sheriff, on the admission of the debtor to the liberties of the prison, be discharged," is not construed to extend to the case of an escape committed before the passing of the act; and if it be so worded as to extend to such case it is void, as impairing the obligation of contracts.

**ACTION** on a gaol bond assigned by the sheriff to the creditor. The declaration stated that, by consideration of the court for the county of Bennington, at the term of said court, holden in June, 1810, the plaintiff recovered judgment against Moses Sage for sixty-five dollars and sixty-three cents damages, and fifteen dollars and forty-two cents costs; that upon an execution duly issued on said judgment, the said Moses Sage was, on the twenty-fourth day of August, 1810, committed to the common gaol in Bennington, and was, on the same day, admitted to the liberties of said prison; that, on that occasion, the said Moses Sage, as principal, and Jonathan Robinson, now defendant, as surety, executed the bond on which the action was brought; that, on the same day, the said Moses Sage escaped from the liberties of the prison, and, thereupon, the sheriff assigned the bond to the plaintiff. The action on said bond was commenced on the fifth day of October, 1811, in the county court for the county of Bennington. The defendant pleaded, in bar, an act of the legislature passed on the thirty-first day of October, 1811, entitled an act for the relief of Moses Sage, setting forth the act *in hæc verba*. The following part of the first section only is material to the case: "It is hereby enacted, etc., that the said Moses Sage is released and discharged from his said imprisonment in said gaol [referring to a recital in the preamble], and shall be free from arrests on all process in civil actions, issuing under the authority of this state, for and during the term of three years from and after the first day of January, 1812. Provided, that the judgment on which the said Moses Sage is confined, shall remain in the same situation as though the writs of

execution had never issued thereon; and that all such bond or bonds as have been taken by the sheriff, or keeper of the gaol in said Bennington, for the liberties of the prison granted to the said Moses Sage, be, and the same are, hereby discharged. And provided any action or actions should be brought against the sheriff of said county, or any of the bail of the said Moses Sage, on account of his being released, this act shall be considered as a sufficient bar to a recovery, and the defendant or defendants shall recover costs." The plaintiff demurred to the plea, and the court rendered judgment for the defendant; whereupon the plaintiff brought this writ of error.

*Wright*, for the plaintiff.

*Skinner*, for the defendant.

By Court, CHIPMAN, C. J. The act of the legislature which is relied upon in this case is not a public act, nor is it a remedial act, in the language of the law. It is a private act, and has been rightly so pleaded. It is an act which gives a privilege to one man, while it infringes, or at least suspends, the rights of another; therefore, upon every sound principle, it ought to receive a strict construction; it is not to be extended in favor of Moses Sage or his sureties beyond that which is clearly expressed, or that which is a necessary and unavoidable inference. Now, if the act had gone no farther than to discharge Moses Sage from his imprisonment, and to permit him to go at large, without expressly declaring that the sheriff or the sureties for the liberties of the prison, should not be liable on the departure of Sage, as for an escape, yet they would not have been liable; such is the necessary inference, the necessary consequence of a legal discharge of the prisoner. If it was lawful for Sage to go at large under the authority of this act, the condition of the bond was not broken by his departure, as he was legally discharged from imprisonment in every case of a civil nature for which he then stood committed; but to construe the act to purge an escape, before that time committed, would be wholly unwarranted, it would be a flagrant abuse of every just principle of construction.

But, it is said, the act is too clear to admit of construction, that the words are express, "that all bond or bonds which have been taken by the sheriff or keeper of the gaol in Bennington, for the liberties of said prison granted to the said Moses Sage, be, and the same are, hereby discharged." The act, indeed, sets out with a very broad expression, "all bond or bonds," and if this clause were not explained by what precedes and what

follows, it might almost afford a pretext for the defendant's construction. But this is to extend the act beyond the manifest intention of the legislature as expressed in the preamble, which is to discharge Moses Sage from his confinement in prison, at that time, and to free his body from arrest for a certain limited time; there is not a word respecting a discharge of his sureties, who had become liable; and the clause which has been relied on does not affect his sureties. Actions may be maintained against them, and they may have their remedy over against Sage. They may proceed by summons or attachment of his property, for that is not by the act intended to be exempted. And although it is crudely expressed, as is almost every part of this act, yet what follows and closes this particular provision draws it towards a point, and the whole intelligibly limits the sense. It makes, with what has just been recited, but one provision: "And provided (or in case) any action or actions shall be brought against the sheriff or any of the bail (sureties in such bonds) of the said Moses, on account of his being released (certainly meaning, on account of Sage's going at large, in consequence of his being, by the act, so discharged), this act shall be considered a sufficient bar," etc. It makes but one provision, and when read so as to render it intelligible is found to have been intended to express what, as before observed, is a legal consequence of a discharge of the principal from his imprisonment, and is no more than that Sage's going at large shall not be deemed an escape; although the person who drew the act seems not to have been aware of the legal inference, or to know how to introduce it by express provision. Such bills are usually drawn by some private friend of the petitioner, and are often passed with too little attention to propriety or accuracy of expression.

It ought further to be observed, that had the provision under consideration been so clearly expressed as clearly to admit of the defendant's construction, yet it could not avail him, it could not be permitted to operate; it would have been a palpable violation of the constitution of the United States, which renders null and void every act, even of a state legislature, made in violation of any express provision of that constitution. In that instrument it is expressly declared that no state shall pass any law impairing the obligation of contracts. Now, whatever may be said with respect to a gaol bond, before the condition be broken, whether it be considered as a contract to which the creditor is a party, or, if I may so say, a substitute for the

walls of the prison, as a means of securing the confinement of the debtor, yet, when the condition of such bond is broken, and the bond is assigned by the sheriff to the creditor, it undeniably becomes a contract between the creditor, the assignee and the signers of the bond. In this case, the condition of the bond had been broken, the bond had been assigned to the creditor, and a suit commenced on the bond by him before the passage of the act. The contract was legal and complete, and the creditor has every just right to claim the benefit of that provision in the constitution of the United States, which was made by the people of the United States to protect their rights against such acts of the state legislatures as should inadvertently, or otherwise, be passed in violation of those rights. The creditor, as one of the people, has a right to claim the benefit of this provision, and that it be held by the court sacred and inviolate. And certainly the court ought anxiously to avoid any construction of a law which would imply in the legislature either an ignorance of their powers and duties or a design to violate the national constitution. From all these considerations the court are clearly of opinion that the judgment of the county court is erroneous and must be reversed.

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### STATE v. PARKER.

[1 D. CHIPMAN, 296.]

**FORGERY—DESCRIPTION OF INSTRUMENT.**—An indictment for forgery should set forth the instrument charged to be forged, in *hæc verba*, unless it be in the hands of the accused, when that fact should be averred in the indictment.

**INDICTMENT** for forgery charging the defendant with uttering, passing and giving in payment “one certain false, forged and counterfeit bank note, made in imitation of a one dollar note issued by the Mechanics’ and Farmers’ Bank in the city of Albany in the state of New York, which bank then and there was and still is legally established by and under the authority of the legislature of the state of New York, one of the United States of America, marked number 6730, bearing date the first day of January, in the year of our Lord 1812, signed by S. Southwick, president, and countersigned by G. A. Worth, cashier thereof, and made payable to E. Dor, or bearer, on demand.” Demurrer to the indictment.

*Prentiss*, for the prisoner, cited *Crown’s Circ. Companion*, 178,

182, 217, 276; 1 Peake, 173; *East's Crown Law*, 975; *Commonwealth v. Houghton*, 8 Mass. 107; 3 Johns. Ca. 299.

*Baylies*, for the state.

By Court, CHIPMAN, C. J. Had I any doubt in this case, as I am alone on the bench, I should postpone the decision; but as I think it a very clear point, I will put neither the public nor the prisoner to any further expense by delay.

The precedents of indictments for forgery are uniform on this point. The instrument charged to be forged is set forth in words and figures in all the numerous precedents which have been produced; and all the authorities hold it necessary, unless in certain excepted cases, one of which is where the instrument charged to have been forged is in the possession of the person charged with the forgery. In such case, it is sufficient to describe the instrument, in the same manner in which it is described in this indictment, omitting to set it forth in words and figures; but the fact that the instrument is in the hands of the person charged, which brings the case within the exception, must be charged in the indictment. The common law authorities are collected, and the doctrine on this point is ably commented upon by Judge Sedgwick in the case cited from 8 Mass. 107. There is certainly great reason for adhering strictly to these principles; the subject in which the offense is charged to have been committed ought, in reason, to be set forth with great precision, that there may be no mistake in the proof, no possibility of substituting one thing for another, that the accused may know precisely what he has to meet, how to prepare his defense, and how to direct his evidence. This is a right of the accused at common law, that common law which the fathers of our revolution claimed as their birthright, and which was secured to us by the event of that revolution. The framers of our constitution constantly kept it in view, and almost the first act of our state legislature was to declare "that so much of the common law of England as is applicable to our local circumstances, and is not repugnant to the constitution or any particular act of the legislature of this state be, and is, adopted as law within this state, and all courts are to take notice thereof and govern themselves accordingly." It is from this source, the common law, that we derive rules and maxims not only for the construction of our statutes, but of the constitution itself; and with the limitations expressed, it is the rule of property and the security of our rights, and furnishes to the courts, in all cases,

civil and criminal, a rule of decision. The courts can no more deprive a person, prosecuted for a crime, of a common law right, than they can deprive him of a statute or constitutional right; modes of practice merely, they may alter, for the more safe and easy attainment of the ends of justice, so that they do not infringe any essential right.

But it is urged that this form of indictment has been in use in this state for more than thirty years, that is, almost from the commencement of the government; that there have been no decisions against it; and that it ought now to be considered as the common law of Vermont, established by usage. That laws affecting essential rights should, by custom, originate in our courts, independent of the constitution and laws enacted by statute, and in opposition to the principles and maxims of the common law, so called, is a thing I cannot understand. It is a doctrine which ought not to be countenanced in this court. If admitted, we should soon, instead of a system formed and matured by the experience of ages, have a crude, undigested mass, or rather farrago, of opinions, adopted through indolence or want of present information, and adopted and continued in practice mostly from the same causes. And where are the courts to look for this common law of Vermont? Not to the authority of decided cases, nor to the writings of the ancient sages of the law, approved through a succession of ages. No, we must resort, for the most part, to the fallible memory of the judges, or members of the bar, or to crude precedents of forms, which may in some countries, by chance, have long passed without exception and without notice. I say, in some countries, because I have observed that, in several counties, indictments are drawn with a most scrupulous adherence to the most approved precedents of the common law.

I would not have it understood, by anything which I have said, that this court is limited by the precedents of decided cases, at common law, or the researches of the numerous and profound commentators. The common law, exclusive of positive law, enacted by statute, depends on principles. Precedents and maxims serve to embody and illustrate principles, to give them a fixed certainty, and afford a facility in applying them to cases, as they arise, not coming within any former precedents. I conceive that these principles will be found amply sufficient for their decision, while they preserve the analogy and symmetry of the system. The only difficulty lies in applying the proper principle, and in applying it with due regard to analogy, which

is the connecting link, and, indeed, the *sine qua non*, of every other system, as well as that of law; and without which, instead of a system, we should have merely a catalogue of individual cases, affording us illustration of principles, no data for general conclusions.

It is true, that a common error sometimes establishes a common right; indeed, it is a maxim of the common law. Such cases, there are where an error, first admitted, has introduced a general custom, involving property and individual rights; such custom becomes a law to the court, and can be superceded by act of the legislature only. On this ground, it is suggested that a decision against the indictment, in this case, will affect the rights of the state, derived under a long practice, and may affect former convictions which have been had on similar indictments. But it is impossible to conceive that the state can, until such a practice become general and without exception, which it certainly has not in this case, or been of even so long a continuance, have acquired any right, or can have any interest in the support of such indictment, in violation of the guaranteed rights of the citizen, the rights of the common law, which can be varied only by the constitution of government, or by a sovereign act of the legislature. As to former convictions, which have been had in this court, there is no provision of law by which they can be corrected or reversed; they will not be affected; they will remain in full force.

I have extended my observations further than the case under consideration seems to require, because the same argument has before been urged in this court, and, I must say, has at times received too much countenance, claiming the privilege of this same common law of Vermont, in favor of analogous practices, affecting essential principles, on the ground that the abuse has been suffered long to be continued.

In every view which I have been able to take of this subject, the indictment ought not to be sustained; it is a departure from ancient and established precedents, is condemned by all authorities, both ancient and modern, and violates the most settled principles of law.

Let the prisoner be discharged.

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The authority of this case is recognized in 1 Bishop Crim. Proceed. sec. 581, and 2 Id. sec. 404.

In *Commonwealth v. Bailey*, 3 Am. Dec. 3, it was held that the number of a bank-bill and the marginal figures indicating its amount, are not considered parts of the bill, and need not be set out in the indictment.

## BARNEY v. CURRIER.

[1 D. CHAPMAN, 315.]

**NOTICE TO ONE PARTNER.**—Notice to one of the partners of a firm, of a prior unrecorded deed, is notice to all the partners and will render void a subsequent conveyance of the same land to the firm.

**BILL** in which complainant stated in substance, that he being indebted to one Levi Hungerford, as security for such indebtedness, conveyed to him in May, 1807, a certain farm of land in Swanton. At the same time Hungerford executed a bond to him with a condition that if he should pay the amount of the debt with interest to Hungerford, the latter should reconvey the same farm. On the twenty-fifth day of July following, the debt not having been paid, and Hungerford being indebted in the same sum to a firm composed of Truman Currier, Luther More and Moses Jewett; Currier, one of the firm, residing in Swanton and carrying on business there as the agent and manager of the firm. Hungerford conveyed to the said firm his right to said farm to discharge his indebtedness to them. The bill charged that the partners at the time of receiving such conveyance had full knowledge of the previous transaction between the complainant and Hungerford. It averred that, on the twenty-fifth of July, 1809, the complainant paid Currier the amount of the indebtedness, who received the same, and agreed to reconvey the farm. In pursuance of this agreement, a deed was made out by Currier on behalf of the firm, reconveying the said farm; which deed was executed by Currier alone, he agreeing to have it executed also by the other partners, who were then absent. The bill charged that More fraudulently conveyed the farm to Jewett, and that the latter, with fraudulent intent, procured from More the conveyance of the premises, and commenced an action against the complainant to recover the possession, against which relief was prayed.

Currier made no appearance. More answered and admitted the partnership; that Currier managed the business of the firm at Swanton, of which management he had no personal knowledge; that in September, 1807, he, More, withdrew from the firm. He denied any knowledge of the transaction between the complainant, Hungerford and Currier.

Jewett, in his answer, admitted the partnership, the withdrawal of More, and the assignment of More's interest to him; and alleged that in October, 1808, the partnership between him and Currier was dissolved by mutual consent, when Currier was

indebted to him in the sum of one thousand five hundred dollars in part payment of which he took from Currier a conveyance of his share of the premises, at a valuation of five hundred dollars. He admitted that about that time, or before that, Currier had received a sum of money from Barney, and had agreed to convey to him the premises, on which he made inquiry of Currier, who informed him that Barney held his receipt for a sum of money, for which he had agreed to convey to Barney his share of the premises, but, on offering to convey, Barney had refused to accept such conveyance. He denied that he had received any consideration from the complainant on account of the premises, or that he had any personal knowledge of the management of the business at Swanton, or of the purchase from Hungerford.

On the trial it was proved that Currier, at the time of the purchase from Hungerford, was fully informed of the bond and condition, and of the nature of the transaction, and that the consideration was no more than the sum due from Barney to Hungerford. Hungerford's receipt for the money from Barney was produced and proved, as also his agreement to reconvey.

*Brayton*, for the plaintiff.

*Keyes and Allen*, for the defendants.

By Court, CHIEFMAN, C. J. It is true, that by the fifth section of the act regulating conveyances of real estate, it is enacted that no deed of bargain and sale, mortgage or other conveyance, in fee-simple of any lands, tenements or hereditaments, shall be good and effectual in law to hold such lands, tenements or hereditaments, against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and accorded as is provided in the act; but we must take this in connection with the fourteenth section of the same statute, which provides: "That all fraudulent and deceitful conveyances of any lands, tenements or hereditaments, procured, made or suffered, with intent to avoid any right, debt or duty, of any person or persons, shall, as against such person or persons, whose right, debt or duty, is so intended to be avoided, his, her or their heirs and assigns be utterly void, any false pretense or feigned consideration to the contrary notwithstanding."

In the construction of this statute, these two sections must be taken together. For one person knowing of the right of another, wanting something only in form to its com-

pletion: for instance, the deed not on record; to intercept that right by taking a conveyance, legal in its form, and procuring it to be first recorded, is a gross fraud and clearly within the fourteenth section of the act above recited. In such case, the deed is void, as well at law as in equity; and if brought before a court of equity, it will generally afford sufficient relief to declare such subsequent deed void; but if the fraud has extended to destroy or intercept the evidence of the prior right, the court will suffer the fraudulent deed to stand in the chain of title, and decree a conveyance to the person entitled in equity. This principle will extend to every person sought to be injured by the fraudulent act, according to his right, not only to him who claims an absolute right, but to all who claim a conditional, defeasible or equitable interest, as well to a mortgagor in respect to his equitable interest, his right of redemption, as to the mortgagee in respect to his legal lien for the security of his debt. The principle is perfectly obvious, and the construction not only consistent with the general objects and design of the statute, but even necessary to their attainment. A contrary construction would, instead of a prevention, render the statute a protection of fraud. And besides, it has been so long established that it cannot be permitted now to be shaken. It is no less firmly established that notice to the agent is notice to the principal, and shall affect him the same as personal notice.

To apply this principle to the present case: Truman Currier was himself a principal, and being in the concern at Swanton the only acting partner, he was to all intents the agent of his copartners, the other defendants. He agreed, in behalf of the partnership, to take a conveyance of the premises to satisfy or secure a partnership debt; and he was informed of the orator's right, that Levi Hungerford held the premises merely as a security for a debt due to him from the orator. As Hungerford then intended to sell, so Currier must have intended to purchase, subject to the orator's right of redemption, and gave a consideration accordingly. The amount of the debt due from the orator to Hungerford was made the consideration of the deed which Currier received.

The deed of conveyance was in form absolute and unconditional. This might or might not have been fraudulent in its inception, according to the use it was intended to make of it afterwards. By this knowledge, and by these acts, and by these acts of their acknowledged agent, the other defendants are

bound equally in law, equity and good conscience. The conveyance from Hungerford was taken to all the defendants, members of the partnership. Truman Currier went further; he received the redemption-money of the orator, the full amount of the debt due the company, to secure the payment of which the conveyance was made. He thereby bound the other defendants, as well as himself, to convey the premises to the orator. He did, on his part, execute a deed of reconveyance, prepared for him and the other defendants to execute; he took it and agreed to procure it to be executed by the other defendants. Here the fraud began to appear. He neglected to procure the deed to be executed by the other defendants, and took measures to defeat the orator's claim and pre-redemption, although he had received the full sum of the redemption and conveyed his share, one third part, to Moses Jewett, one of the other defendants.

Luther More does not appear to be at all implicated in this foul transaction. He had, by consent, withdrawn from the partnership concern in Swanton, and it does not appear that he had any personal knowledge of this transaction; and, although his name had been made use of in the conveyance from Hungerford, he being then a partner, he appears very honestly, on Jewett's application, to have released his share, as he supposed he was in equity and good conscience bound to do; but Jewett, the other defendant, is deeply implicated. He insists, in his answer, that he is a *bona fide* purchaser for a valuable consideration; but he concedes that, at the time he took the deed from Currier, he had heard a report that he, Currier, had received a sum of money from the orator, and had agreed to convey the premises to him. He also concedes that, on inquiry, Currier acknowledged that the orator held such receipt, which he had given him, and that he had agreed to convey to the orator one third part of the premises, and that the orator refused to accept such conveyance, but that Currier denied that he had ever agreed to convey the whole of the premises to the orator, or to procure a conveyance from the other partners. The manner of expression and the degree of caution used clearly show that Jewett had been correctly informed of the whole transaction, and yet he claims to hold the premises against the orator, contrary to equity and good conscience.

As the evidence of title is now in Jewett, there must be a decree that he convey the premises to the orator, and that he and Currier pay costs, and that Luther More, the other defendant, be dismissed without costs.

On the question of notice, the authority of this case is followed in *Wright v. Bates*, 13 Vt. 350. And showing that notice to one partner is notice to all, the case is followed in *Stevens v. Goodenough*, 26 Vt. 683; and in *Miller v. Finn*, 1 Neb. 290.

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## PEASLEE v. BARNEY.

[1 D. CHIPMAN, 331.]

**FRAUDULENT CONVEYANCE, WHO MAY IMPEACH.**—A party or his heirs cannot in law or equity have his contract set aside on the ground of it being fraudulent on his part; nor does his administrator even in the case of an insolvent estate, so far represent the creditors as to have a right to set aside such contract; this right belongs solely to the creditors.

**BILL of review to reverse a decree made in favor of the administrator of Udney Hay against the administrator of Zacheus Peaslee.** It appeared by the record that William Barney, administrator of Udney Hay, deceased, obtained a decree in January, 1813, against Robert Peaslee, administrator *de bonis non* of Zacheus Peaslee (both Zacheus Peaslee and Sarah Peaslee, his administratrix, having died pending the suit), setting aside sundry conveyances made by the said Hay in his life-time to Zacheus Peaslee, to lands therein described, on the ground that the said conveyances were made without consideration and with intent to injure and defraud the creditors and heirs of the said Udney Hay. The decree recited the substance of the bill and the revivals and continuances upon the death of Zacheus and Sarah Peaslee, but did not state the plea or answer, or in what shape the case was heard. The bill of review assigned sundry errors in the decree, the nature of which sufficiently appears in the opinion.

*Mitchell*, for the plaintiff.

*Keyes*, for the defendant.

By Court, CHIPMAN, C. J. I shall first dispose of the third and fifth exceptions which have been taken to the decree under review. The third exception is, "that although it is alleged in the bill that Zacheus Peaslee held the said lands in trust for the said Udney Hay, it does not appear by the bill or the decree that there was any declaration of trust in writing." This exception, we think, is without foundation. It is true, it has been determined in the case of a bill for the specific performance of a contract required by the statute of frauds to be in writing, that unless it be stated in the bill that the agreement

was in writing, the defendant may demur for that cause. He may also plead that there is no agreement in writing, and it would be sufficient for the orator to reply and prove a written agreement; but if the exception be not taken till the hearing, the defendant cannot object to proof of an agreement in writing, because not so stated in the bill, nor is it the course to set forth in the decree what evidence or proof was produced in the cause.

The fifth exception is, "that it does not appear from the decree that there was any answer to the bill, any issue on which the cause was heard, or that the bill was taken *pro confesso*." This is certainly an omission of the clerk who drew up the decree; but it appears to have been merely an omission of the clerk; that the case was heard on answer and traverse, upon proof. We think such omission may be supplied, if necessary, in a case like the present, which we do not decide from the files and entries in the original cause; and that when the error alleged arises from a mere omission or misrecital through the negligence or mistake of the clerk who drew up the decree, the court will look in the files in the case to supply and correct it.

The other exceptions raise some very important questions, particularly the first exception.

The principal question is, whether it would be competent to the administrator to impeach and set aside an act done by his intestate in his life-time for the fraud of the intestate himself. Let us imagine what is the situation, what the rights and duties of an administrator: To all the purposes of the settlement of the estate, he represents the intestate. To that end, under the direction of the law, he has the disposal of the estate; he represents the intestate in all claims and rights beneficial to the estate, which the intestate himself had, or which were accruing. And with respect to the estate coming to his hands and possession, he represents the intestate in his liability to all legal claims and demands of others, except in certain special cases of tort, in which it is a maxim: *Actio personalis moritur cum persona*. No man can, either at law or in equity, nor can his heirs set aside any of his contracts because fraudulent on his part. And that which was never a right in the intestate, can never become a right and attach a remedy in the administrator. It is true, as has been argued, that a man, if defrauded by others, may have his remedy either in law or equity, and obtain relief according to the nature of his case; and the same right attaches in the administrator, in virtue of his representative

character; but the distinction between the cases is too obvious to need illustration.

It has been argued that, by our law, the administrator represents not only his intestate, but his creditors also, especially when the estate is insolvent. He represents the intestate who is the debtor, and certainly the law cannot be construed into such an absurdity as to vest in the same person and character, in respect to the same subject, the conflicting rights and duties both of debtor and creditor; there is nothing in any law to countenance such a notion.

But the case is not without a remedy. The creditors, who have been injured by the fraudulent act, may have a remedy to restore the estate fraudulently withdrawn or incumbered in the hands of other persons, to the proper fund for the payment of debts. For this purpose any creditor may bring a bill in behalf of himself and other creditors, against a party to the fraud, or against those who have the estate fraudulently in possession. In such case the administrator, instead of being a party plaintiff, must be made a defendant, that he may, by the decree, be compelled to proceed, with the estate recovered, in the payment of the debts in a due course of administration. But the relief extends no farther. A creditor at common law may have his action against the person so fraudulently holding the property, charging him as executor *de son tort*. This, however, if not superseded by our law, could but be a partial and inconvenient remedy. But every person may, by act to take effect in his lifetime, or by last will and testament, dispose of all or any part of his property to others; and whatever may be the strict moral character of such act, the law does not consider any injury done to the heirs or next of kin. But the creditors have, in respect of their debts, a general lien upon the property.

These principles established, put out of the present case the question intended to be raised under the second exception, whether it ought not to have been alleged in the bill that there were creditors of Udney Hay, the intestate, who were injured by the fraud. Certainly, if there were no creditors, nobody was injured; but if there were creditors, it was for them, and not the administrator, to pursue the remedy: *Osborne v. Morse*, 7 Johns. 161 [5 Am. Dec. 252]; *Hawes v. Leader*, Cro. James, 270.

I will further observe that the bill and decree, in this case, seem to have gone, at least in part, upon a principle totally inconsistent with that full dominion and right of disposal which our law gives to every person over his property, and to suppose

that every one is under some duty of perfect and legal obligation to preserve his property secure to those who may be his heirs. But this is not so. Even as it respects children, whose claim from nature is the strongest, the claim is contingent and subject to the dominion, control and disposition of the parents, either by act *inter vivos*, or by last will and testament; he may make an effectual gift of all his property without leaving anything to his children, or he may dispose of it to and among his children, in any proportion or to any of them. And, to his children and nearest heirs, it is a sufficient reason to say: such was my will and pleasure. The consequence of these principles is that the decree is erroneous and must be reversed.

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## ACKNOWLEDGMENT.

1. **VALID UNDER STATUTE.**—A deed by husband and wife, executed in Baltimore county, in Maryland, and acknowledged before two justices of that county, whose certificate was accompanied by the attestation of the clerk of the county court, under the seal of the court, "that the persons who took the acknowledgment were justices of the peace, and that there were no magistrates superior to them in Baltimore county," is duly acknowledged within the act which gives effect to acknowledgments by husband and wife, "made before any mayor or chief magistrate or officer of the cities, towns or places, where such deeds are or shall be made or executed, and certified under the common or public seal of such cities, towns or places." *McIntire v. Wood*, 417.
2. **BY FEMES COVERT.**—It is not essential that the officer, taking the acknowledgment of a *feme covert*, should literally comply with the form of the statute; it is sufficient if there is a substantial compliance. *Id.*
3. **VALIDITY OF, BY FEME COVERT.**—Where a statute required the wife to make acknowledgment that she executed a conveyance without coercion or compulsion of her husband, and the certificate stated that "she, being of full age, separate and apart from her said husband, examined and the full contents made known to her, voluntarily consenting thereto;" it was held that this was a substantial compliance with the law. *Shaller v. Brand*, 482.

## ACTION.

1. **FOR MONEY HAD AND RECEIVED.**—An action for money had and received cannot, in general, be supported unless the defendant has in fact received money. But where an attorney or agent has discharged a debt due to his principal, and applied that debt to the payment of a debt which he himself owed to his principal debtor, the amount of the debt which he has so discharged may be recovered in this form of action. So where an attorney issued execution on a judgment recovered by his client, and became himself the purchaser of the land sold under the execution, and paid for the same by discharging the judgment against the defendant, it was held that his client might maintain this action against him. *Beardsley v. Root*, 386.

2. **IDEM.**—The action for money had and received is an equitable action, and the plaintiff, in support of it, can resort to and prove all equitable circumstances incident to his case; and where money was received by an agent of a corporation, an obligation was thereby incurred by the corporation. *Kennedy v. Baltimore Ins. Co.*, 499.
3. **RIGHT OF ACTION TO THIRD PERSON.**—A third person, not being present, but in whose favor a stipulation is made, may avail himself of it. *Smith v. Kemper*, 708.

#### ADVANCEMENT.

**WHEN NOT PRESUMED.**—The purchase of land by a parent, in the name of a minor child, is not to be deemed an advancement, where it expressly appears that such was not the parent's intention, as for instance, where the object was to protect the title against creditors. *Jackson v. Matsdorf*, 355.

#### AGENCY.

See **PRINCIPAL AND AGENT.**

#### ARBITRATION AND AWARD.

**AWARD, WHEN BAD FOR UNCERTAINTY.**—Where an award directed that the defendant should give an indorser "as per agreement submitted to the arbitrators and acknowledged by the parties," although it may be susceptible of being made certain and good by reference to the agreement to which it relates, yet there being no sufficient averment in the declaration by which the defect is cured, both the declaration and the award are bad. *Walsh v. Gilmor*, 502.

#### ATTACHMENT.

**WHEN BINDING.**—The return of a second attachment by a sheriff upon property which he had previously attached, in an action between the same parties, is not binding, unless the property is in the actual or constructive possession of the sheriff. *Knap v. Sprague*, 64.

#### ATTORNEYS.

1. **DEALINGS BETWEEN ATTORNEY AND CLIENT.**—On general principles of equity and policy, the court will strictly regard and examine the dealings between attorneys and their clients, in order to protect the latter from any undue consequences resulting from a situation in which they may stand unequal. Accordingly, where a judgment was entered by an attorney by confession against his client, partly for costs, an inquiry was ordered as to the consideration, and proceedings stayed in the meantime. *Starr v. Vanderheyden*, 275.
2. **POWER TO DISCHARGE DEFENDANT.**—An attorney cannot make a valid discharge of a defendant in custody on a *ca. ex.*, without the plaintiff's consent, or without satisfaction received either by the plaintiff or by the attorney. *Kellogg v. Gilbert*, 335.
3. **PURCHASE BY ATTORNEY.**—An attorney, by his general authority as such, cannot purchase land sold under an execution in favor of his client, either in trust or for the benefit of such client. *Beardsley v. Root*, 386.
4. **SECRETS COUNSEL BOUND TO KEEP.**—It is a settled rule of law that coun-

sel and attorneys ought not to be permitted to give evidence of facts imparted to them by their clients, when acting in their professional character. And this restriction is not confined to facts disclosed in relation to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise. *Parker v. Carter*, 513.

- 5 **WHEN PROFESSIONALLY ACTING.**—A duly qualified counsel or attorney, employed as such to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him, and the same rule applies to interpreters acting as the organ of communication between the client and his attorney. *Id.*

### AUCTION.

**BID BY LETTER.**—If property be advertised for sale, and one offer a price by letter higher than any other bidder, and the property is conveyed accordingly to the offer of the letter, the property will be considered as sold at auction, and the directions of a testator to sell his lands by auction will be held to have been substantially complied with. *Tyres v. Williams*, 643.

### AUTREFOIS CONVICT.

See **CRIMINAL LAW**, 7.

### BARRATRY.

**AS TO CARGO.**—Barratry may be committed by the master of a ship in respect to the cargo, although the owner of the cargo is at the same time owner of the ship; and although the master is supercargo, or consignee for the voyage. *Cook v. Commercial Ins. Co.*, 353.

### BONDS.

1. **FOR FAITHFUL PERFORMANCE — CONSTRUCTION.**—Where the condition of a bond was, that one appointed to an office in a bank should well and faithfully perform all his duties, truly account for moneys intrusted to his care, and continue in said service for the term of two years, unless sooner discharged; it was held that the clause respecting the two years operated only to prevent the officer from quitting the service within two years, and that the condition of the bond protected the bank so long as he continued to serve under the appointment. *Worcester Bank v. Reed*, 65.
2. **FOR INDEFEASIBLE TITLE.**—A bond to "make an indefeasible title in fee-simple, such as the state makes," demands a deed with general warranty; and under such obligation the court will not compel the vendee to accept a title that is doubtful. *Kelly v. Bradford*, 656.

### COMMON CARRIERS.

2. **LIABILITY OF COMMON CARRIERS BY WATER.**—Persons who undertake to carry goods for hire, whether the transportation be from port to port, or beyond sea, at home or abroad, are held to the same liability as other common carriers, being liable for all losses, not arising from inevitable

accidents, or such as could not be foreseen or prevented. *Elliott v. Russell*, 306.

2. **TRESPASS BY COMMON CARRIER.** Where it appeared that a common carrier fraudulently opened certain packages and casks intrusted to his care, and took therefrom a part of their contents and converted the same to his use, but it did not appear that the contents were feloniously carried away, such offense was held to amount to a trespass, and not larceny. *Cook v. Darby*, 529.

### CONFLICT OF LAWS.

1. **ASSIGNMENT UNDER FOREIGN LAW.**—An assignment by commissioners of bankruptcy in a foreign country, does not operate as a legal or equitable transfer of the property of the bankrupt elsewhere, so as to prevent a creditor in another jurisdiction from resorting to such property or debts for payment, or the bankrupt from transferring the same. *Dawes v. Boylston*, 72.
2. **RIGHTS OF LEGATEES, BY WHAT LAW GOVERNED.**—The rights of legatees, especially of residuary legatees, as well as of the next of kin, depend upon the laws of the country where the deceased had his home; and to this end all the choses in action and personal effects are to be deemed local, to be there accounted for, and finally administered where collected, or accruing in possession to the executor or administrator. *Id.*
3. **ASSIGNMENT UNDER FOREIGN BANKRUPT LAW.**—An assignment by commissioners of bankruptcy in England, does not prevent an attachment of the bankrupt's effects by an American creditor. *Milne v. Moreton*, 466.
4. **FOREIGN BANKRUPTCY PROCEEDINGS.**—Proceedings in bankruptcy in a foreign country, cannot operate so as to affect the rights of citizens under contracts made here. *Mitchel v. McMillan*, 690.

### CONSTITUTIONAL LAW.

1. **POWER OF LEGISLATURE.**—The legislature has no constitutional authority to suspend the operation of a general law in favor of an individual. *Holden v. James*, 174.
2. **SUSPENSION LAW UNCONSTITUTIONAL.**—An act "to suspend executions for a limited time," commonly called the suspension act, is unconstitutional, as being in conflict with the clause of the United States Constitution forbidding a state passing any "law impairing the obligation of contracts." *Jones v. Crittenden*, 532.
3. **CONSTITUTIONALITY OF SUSPENSION LAW.**—Where there is some public necessity, as in case of war, or invasion, an act suspending legal proceedings for a limited period, is not unconstitutional; for a statute of this kind rather conduces to the due administration of justice, and is beneficial to parties litigant. *Johnson v. Duncan*, 675.
4. **OBLIGATION OF CONTRACT.**—A special act of the legislature, freeing the body of a debtor from imprisonment, and providing that "all such bonds as have been taken by the sheriff, on the admission of the debtor to the liberties of the prison, be discharged," is not construed to extend to the case of an escape committed before the passing of the act; and if it be so

worded as to extend to such case it is void, as impairing the obligation of contracts. *Starr v Robinson*, 732.

See STATUTES, 2.

# CONTRACTS.

1. **MUTUAL PROMISES—CONDITION PRECEDENT.**—In mutual promises, where money is to be paid on a day certain, and the performance by the other party is to take place on the happening of a certain event contemplated to take place before the day fixed for the payment of the money, and the event happens accordingly, the party failing to perform has no right of action for the money. *Johnson v. Reed*, 36.
2. **VOID AGAINST PUBLIC POLICY.**—At the meeting of the creditors of an insolvent, one of the creditors refused to sign a discharge unless he was first paid or secured a sum of money, part of his demand. Another creditor gave him his promissory note for this sum, when he signed. In an action brought on the note, it was held that the note was absolutely void, being against the policy and in fraud of the insolvent act. *Yeomans v. Chatterton*, 277.
3. **RECOVERY ON DEPENDENT COVENANTS.**—It was agreed between defendant and plaintiff that defendant should pay plaintiff for completing the whole of certain work, a specified sum to be paid on or before a day fixed, in installments as the work progressed; these covenants were held to be dependent, and plaintiff not entitled to recover the whole, without full performance, nor any proportion without a ratable performance. *Cunningham v. Morrell*, 332.
4. **INDEPENDENT COVENANTS.**—Where a covenant goes only to part of the consideration on both sides, and a breach may be compensated by damages, it is an independent covenant, and an action may be maintained against the defendant for a breach of his covenant, without averring performance. *Obermyer v. Nichols*, 439.
5. **RESCISSON.**—Where a party refuses to keep goods according to contract, after they have been delivered to him under the contract, and the other party takes them from his warehouse with his knowledge and consent, for the purpose of a sale at auction, the contract is not thereby rescinded. *Walsh v. Gilmor*, 502.
6. **VOID CONTRACT—ILLEGAL CONSIDERATION.**—A bond, part of the consideration of which is an agreement not to prosecute for malicious mischief, is void as against public policy. *Cameron v. McFarland*, 566.
7. **COVENANTS, WHEN TO BE PERFORMED.**—When no time is fixed for the performance, if the thing to be done is local, the party who has contracted the obligation to perform it will have during his life in which to do it, unless hastened by request; but if it be transitory, he will be bound to perform it in a convenient and reasonable time; and if he fail in the performance, although there may have been no special request, he will be liable for a breach of his contract: *Philips v. Morrison*, 638.
8. **WRITING IMPLIES CONSIDERATION.**—A valuable consideration is necessarily implied from an obligation in writing, although none is therein expressed. *Kelly v. Bradford*, 656.

9. **SUPPRESSIO VERI GROUND FOR RESCISSION.**—A contract for the sale and purchase of land will be rescinded where the vendor fails to disclose that the land was covered by two adverse claims and elder patents. *Peebles v. Stephens*, 660.
10. **PROMISE VOID.**—A promise made in consideration of the governor being prevailed on by the promisee to appoint the promisor to an office is not binding, being against public policy. *Faurie v. Morin*, 701.
11. **RESCISSION.**—In some cases the purchaser of property may, at his option, on account of fraud practiced by the seller, rescind, and by action of *indebitatus assumpsit* recover back the price; or by an action of deceit or other proper action recover his damages; but he can, in no case, maintain *indebitatus assumpsit* for the purchase-money, without a previous offer to rescind and a demand of repayment. *Warner v. Wheeler*, 717.

See ACTION, 3.

### CORPORATIONS.

1. **LIABILITY OF TOWN.**—No action lies at common law against a town for damages occasioned by defective highways. *Mower v. Leicester*, 63.
2. **ASSUMPSIT FOR ASSESSMENTS.**—Where one subscribed for a certain number of shares in a turnpike and promised to pay, on demand, to the agent of the corporation, all assessments levied thereon, it was held that the corporation could bring *assumpsit* to recover the amount of such assessments. *Taunton Turnpike v. Whiting*, 124.
3. **LIABILITY FOR ASSESSMENTS.**—Where the course of a turnpike road was altered by law, subsequent to the defendant's subscription for a certain number of shares and promise to pay all assessments thereon, it was held that defendant was not bound to pay the assessments, although he had, as one of the directors petitioned the legislature for such alteration, and had held an office in the corporation subsequent thereto. *Middlesex Turnpike v. Swan*, 139.
4. **LIABILITY IN ASSUMPSIT.**—An aggregate corporation may be liable in an action of *assumpsit*; and this liability may appear by evidence of some express stipulation in the name of the corporation made by their agent duly authorized, or by evidence of some act or request of their agent within his authority where no express stipulation is proved. *Hayden v. Middlesex Turnpike*, 143.
5. **RIGHT TO SUE FOR SUBSCRIPTION.**—Subscriptions having been made by various persons for the erection of an academy, the legislature subsequently incorporated certain trustees, and in the act of incorporation provided that all moneys subscribed should be received and held by such trustees in trust for the academy. It was held the corporation could not maintain *assumpsit* upon this agreement against one of the subscribers for the money so subscribed by him. *Phillips Academy v. Davis*, 162.
6. **LIABILITY FOR SUBSCRIPTION.**—An action may be maintained against a stockholder in a turnpike corporation, at the suit of the corporation, on his promise in writing to pay for subscribed shares in installments, notwithstanding the remedy given by statute forfeiting the shares and previous payments. *Goshen Turnpike v. Hurtin*, 273.

7. **CONTRACT WITH OFFICERS DE FACTO.**—A clergyman entered into a contract for a year's service with a vestry, who were not legally elected, but who, as far as he knew, were the officers *de facto*. Having performed the duties according to such contract, he was held entitled to recover for his services. *St. Luke's Church v. Mathews*, 619.
8. **CONTRACT VOID—WHEN.**—But when, apprised of the illegality of the election of the vestry, he made with them a contract for the ensuing year, it was considered proof of collusion, which should prevent him recovering for services during this time, and a perpetual injunction was decreed against any suit for services rendered during the second year. *Id.*
9. **VALIDITY OF BY-LAW.**—The right of a corporation to make by-laws is unquestionable, but they must be conformable and subordinate to its character; and they must be reasonable. *Id.*

See EVIDENCE, 7.

#### COVENANTS IN DEED.

1. **INCUMBRANCE.**—Where a pew in a meeting-house recently built was transferred, with a covenant that it was free from all incumbrances, it was held, that the liability of the pew to an assessment to defray the expenses of building the meeting-house was not an incumbrance within the meaning of the covenant. *Spring v. Tongue*, 21.
2. **RIGHT TO RECOVER ON COVENANTS OF WARRANTY.**—Where there have been several conveyances of land with covenants of warranty, and an eviction of the last covenantee, an intermediate covenantee, who has not been damnified, is not entitled to recover against a prior covenantor. *Booth v. Starr*, 233.
3. **BREACH OF COVENANT OF WARRANTY.**—An action of covenant will lie on the warranty contained in a deed of conveyance of real estate; but to entitle the covenantee to recover on such warranty the plaintiff must prove an eviction by a paramount title. *Booker v. Bell*, 641.
4. **EVICITION UNDER JUDGMENT—EVIDENCE.**—An eviction may be with or without the judgment of a court. In the former case the record is the only evidence of eviction, and whether by default or upon a defense, is immaterial, the record being evidence of the fact of eviction only, not that it was by a paramount title. *Id.*

See DAMAGES, 5, 6, 7, 8; REAL ESTATE, 1.

#### CRIMINAL LAW.

1. **RIOT—FORM OF INDICTMENT.**—It is sufficient if an indictment for a riot charge that the defendants unlawfully assembled "with force and arms," and being so assembled committed the act, without repeating the words "force and arms," as they apply to every distinct allegation. *Commonwealth v. Runnels*, 148.
2. **IDEM.**—If an unlawful act is charged in the indictment to have been committed, it is unnecessary to allege that it was done *in terrorem populi*, but where the defendants went about armed without committing any act there that allegation is necessary. *Id.*
3. **RIOT DEFINED.**—Where numbers unlawfully combine to disturb another in the enjoyment of a lawful right, the act is a riot. *Id.*

4. **SUFFICIENCY OF CHARGE IN INDICTMENT.**—An indictment charging that the defendant, with a certain stone which he held, in and upon the right side of the head of the deceased, feloniously, etc., did cast and throw, and that the defendant, with the stone aforesaid, the deceased in and upon the right side of the head feloniously, etc., did strike, sufficiently charges that the defendant threw the stone and struck the deceased. *White v. Commonwealth*, 443.
5. **CHARGING DEGREE OF MURDER.**—In an indictment for murder it is not necessary so to describe the offense as to show whether it be murder of the first or second degree. Nor is it necessary that the indictment should conclude against the form of the statute. *Id.*
6. **STYLE OF PROCESS.**—Process must go in the name of the commonwealth, but it is immaterial in what part of the precept the commonwealth is introduced, so that the command is given in its name. *Id.*
7. **AUTREFOIS CONVICT.**—A person may be indicted for an assault committed in view of the court, though previously fined for the contempt, the same act constituting two offenses, one against the court and the other against the public peace, and therefore the plea of *autrefois convict* is not available. *State v. Yancy*, 553.
8. **ROBBERY—DISTINCT ASPORTATIONS.**—Where there is one continuing transaction, though there may be several distinct asportations, the party may be indicted for the final carrying away. *State v. Trexler*, 558.
9. **FORCIBLE TAKING.**—Snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery. *Id.*
10. **IDEM.**—Where the prosecutor in the presence of the prisoner accidentally dropped a bank note, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued for the possession of it which resulted in the prisoner's keeping it and carrying it away, it was held that it was a forcible trespass, the note not being the subject of larceny. *Id.*
11. **FORGERY—DESCRIPTION OF INSTRUMENT.**—An indictment for forgery should set forth the instrument charged to be forged, *in hæc verba*, unless it be in the hands of the accused, when that fact should be averred in the indictment. *State v. Parker*, 735.

#### DAMAGES.

1. **LIABILITY OF PRINTER OF PAPER.**—A printer of a newspaper is generally liable for carelessness in printing an advertisement; but not for incidental and remote consequences, though involving considerable loss and damage to his employer, where the printer was not particularly apprised of the necessity of correctness in the individual instance. *Jackson v. Adams*, 94.
2. **CONSTRUED AS PENALTY.**—One agreed that for seven years he should not be interested in a certain trade, and bound himself, his heirs, etc., in a certain sum for faithful performance; this agreement was held not to liquidate the damages, but the sum named was to be considered in the nature of penalty. *Perkins v. Lyman*, 158.
3. **MEASURE OF—FAILURE TO DELIVER.**—Where there is a failure to deliver certificates of stock pursuant to contract, the measure of damages is not

the nominal amount of the stock with interest from the day when it should have been delivered, but its true value on that day, including the interest then due, with legal interest on such value until payment. *Bull v. Douglas*, 518.

4. MEASURE OF COMPENSATION.—The measure of the compensation to be made for a deficiency in a case of a sale of land by the acre, unattended with any particular circumstances, is the average value of the whole tract, without regard to the fact that the deficiency was in a certain quality of land. *Nelson v. Carrington*, 519.
5. BREACH OF COVENANT OF WARRANTY.—On a breach of the covenant of warranty, after an eviction, the measure of damages is the consideration paid, with interest, without considering the increased value of the land at the time of eviction, whether such increase arises from the ordinary and regular rise of property or from improvements or otherwise. *Phillips v. Smith*, 542.
6. BREACH OF COVENANT OF WARRANTY.—In case of an eviction, the measure of damages on a breach of the covenant of warranty is the consideration paid with interest. *Henning v. Withers*, 589.
7. CONSEQUENTIAL DAMAGES.—Consequential damages cannot be recovered for a breach of the covenant of warranty. *Id.*
8. DAMAGES FOR BREACH OF COVENANT OF WARRANTY.—The measure of damages for a breach of the covenant of warranty in a deed is the consideration paid and interest. That the vendee is not accountable for rent by the statute, is not a cause for exempting the vendor from the interest, but he is entitled to a deduction for the value of improvements on the land at the time of the sale for which the vendee recovered of the evictor. *Booker v. Bell*, 641.

See SPECIFIC PERFORMANCE.

## DEEDS.

1. DEED ENTITLED TO RECORD.—Where a deed is executed by a husband and wife, an acknowledgment by the husband is sufficient to entitle it to be recorded. *Catlin v. Ware*, 56.
2. EXECUTION BY WIFE.—Where, in a conveyance by a husband, the signature and seal of the wife are affixed, but her name not being otherwise mentioned in the deed, it was held that she did not thereby bar her right of dower. *Id.*
3. DELIVERY.—Where a deed is executed and acknowledged without the knowledge of the grantee, and delivered to a third person to be delivered over to the grantee on the grantor's death, it was held that the deed was effectually delivered at the time of the first delivery, for the use and benefit of the grantee, he having received the deed and claimed the premises under it after the grantor's death. *Hatch v. Hatch*, 67.
4. ALTERATION.—Rules as to the alteration of written executory contracts are not applied with the same strictness to conveyances of real estate which has vested in possession. *Id.*
5. DELIVERY.—Where a father executes a deed in favor of his son, and requests the scrivener to record the same and then retain it in his hands

til called for, which he does, and the father reclaims and cancels the deed after the death of the son, who never had any knowledge of these transactions, it was held that the conveyance had not been perfected by delivery of the deed, and that the father was entitled to the premises as against the heirs of his son. *Maynard v. Maynard*, 146.

6. **DEED CONSTRUED AS A COVENANT TO STAND SEISED.**—A husband and wife, in consideration of love and good will, executed a deed purporting to give, grant, and confirm certain lands to two of their sons, and to their heirs, with the usual covenants of seisin and warranty, reserving to the grantors the use and improvement of the premises during their lives; it was held that though the deed did not operate as a feoffment, because it purported to convey a freehold *in futuro*, yet it was good as a covenant to stand seised to the use of the grantors during their lives, and, after their death, to the use of the grantees and their heirs. *Barrett v. French*, 241.
7. **CONVEYANCE BY ONE OUT OF POSSESSION.**—If a person out of possession conveys to a stranger land held adversely by another, the conveyance is void, so that the grantee cannot maintain an action upon it. *Jackson v. Demont*, 259.
8. **RELEASE TO TENANT IN POSSESSION.**—Where a tenant in possession of land, claiming to hold adversely, after issue joined in an action of ejectment against him, received a deed of release of the premises from one of the lessors, it was held that the deed was effectual as between the parties to it, so that the grantor, as between him and the grantee, is estopped from setting up any claim to the property purported to be conveyed. *Id.*
9. **DEED IN EVIDENCE.**—If a deed be received in evidence without objection on the trial, it cannot be afterwards objected that it ought to have been pleaded *puis darrein continuance*. *Id.*
10. **COVENANT TO STAND SEISED.**—A deed conveying an estate in fee to the grantee, with a reservation of a life estate in the grantor, is good as a covenant to stand seised. *Jackson v. Staats*, 376.
11. **DEED IN FRAUD OF CREDITORS.**—A deed made to defeat and defraud creditors is void as against creditors, but not as against the grantor himself, or his children. *Reichert v. Castator*, 402.
12. **PRIOR VOLUNTARY CONVEYANCE, WHEN VALID.**—A prior voluntary conveyance of land shall prevail against that of a subsequent purchaser, unless the latter is fair and honest. Hence where A., in consideration of blood and affection, conveyed his lands to his son, and afterwards for a valuable consideration sold the same land to B., with the intention of defrauding his creditors, it was held that the son was entitled to recover from one who purchased of B. with notice of the facts. *Squires v. Riggs*, 564.
13. **"MORE OR LESS" IN DEED.**—The meaning of the term "more or less" in an obligation for a conveyance of land is that the parties are to run the risk of gain or loss in the estimated quantity; but the use of that term does not preclude an inquiry into a fraud which may have been committed by either party. *McCown v. Delany*, 635.

14. **DESCRIPTION OF LAND.**—A deed which conveys no particular spot of ground can transfer no title nor bar a prior equity. *Hart v. Hawkins*, 666.  
See BONDS, 2.

## DOWER.

1. **BAR OF.**—Where a wife releases her claim of dower by joining her husband in a conveyance and the purchaser recovers back the purchase-money on account of the grantors's defect of title to the land, the release of the wife thereby becomes inoperative, and does not bar her right of dower after her husband's decease. *Stinson v. Sumner*, 49.
2. **IN IMPROVEMENTS.**—A widow should recover her dower in the tenements as they were at the time of alienation by the husband. But as against the heir she should have dower in improvements made by him after descent cast. *Catlin v. Ware*, 56.
3. **SEISIN TO SUPPORT.**—Where a husband purchased an equity of redemption in mortgaged lands, and subsequently mortgaged the premises to the prior mortgagee, to whom he afterwards released all his interest, it was held that the husband did not have such a seisin as would entitle the wife to dower against the mortgagee and his assigns. *Bird v. Gardner*, 137.
4. **BAR OF.**—Dower cannot be barred by the provisions of a will, unless the provision be given expressly in lieu of it, and accepted by the widow. *Pickett v. Peay*, 594.

See EVIDENCE, 16; LEGACIES, 2.

## DURESS.

- PER MINAS.**—To avoid a deed on the ground of duress *per minas*, the threats must be such as to strike with fear a person of common firmness and constancy of mind. Duress by mere advice, direction, influence and persuasion is not recognized in law. *Barrett v. French*, 241.

## EASEMENTS.

- PRESCRIPTIVE RIGHT OF FISHERY.**—No presumption of a public grant to an individual of an exclusive right of fishery in navigable waters arises from his uninterrupted use and possession of such fishery for fifteen years. To gain such exclusive right by use and possession, the possession and use must be exclusive as well as uninterrupted. *Chalker v. Dickson*, 250.

## EQUITY.

1. **OMISSIONS TO PLEAD AT LAW.**—A party having a defense at law and neglecting to avail himself of it cannot have relief in equity. *Gatlin v. Kilpatrick*, 557.
2. **RESCISSON OF CONTRACT FOR INCUMBRANCES.**—The court will not set aside a contract for the purchase of a house and lot on the mere allegation of an imperfect or incumbent title not clearly shown to be so, where the purchaser has been long in possession, and after a confession of judgment for the purchase-money, this being considered as a waiver of the objections; but the court might give some relief ultimately, if the title turned out to be really bad. *Roach v. Rutherford*, 606.

3. **RELIEF AGAINST JUDGMENT AT LAW.**—Equity will grant relief against a judgment at law for money won at gaming, where the judgment was by default. *Clay v. Fry*, 654.
4. **IDEM.**—If the defense is purely legal, a party failing to avail himself of it in a court of law will not be permitted to resort to a court of equity for relief; but if it be of such a nature that a party may avail himself of it either at law or in equity, relief may be granted, although the defense might have been made at law. *Id.*
5. **TIME OF PERFORMANCE IN EQUITY.**—Equity does not regard time as the essence of a contract, unless so expressly stipulated, therefore a specific execution will be decreed after the lapse of a stipulated time without performance, or an offer to perform, unless there has been culpable negligence or willful delay on the part of him who asks performance. *Tyres v. Williams*, 663.
6. **PRIOR EQUITY—WHEN TO PREVAIL.**—A purchaser relying on want of notice must have paid the consideration and have the conveyance executed to him before his claim shall prevail over that of a prior equity. *Hart v. Hawkins*, 666.

See VERDICT.

#### EVIDENCE.

1. **EVIDENCE OF INSANITY IN SLANDER.**—Where a defense of insanity is set up in slander, evidence is admissible, showing insanity at the time of speaking, and for several months before and after, but no farther. *Dickinson v. Barber*, 58.
2. **OPINIONS OF PHYSICIANS.**—The opinions of physicians concerning such insanity, but stating no facts on which such opinions are based, are not admissible in evidence. *Id.*
3. **ADMISSION OF ORAL TESTIMONY.**—Oral testimony is not admissible to contradict, vary, or materially affect, by way of explanation, any written contract, whether within the statute of frauds or not, provided the contract is perfect in itself, and is capable of a clear and intelligible exposition, from the terms of which it is composed. But this rule does not prohibit the showing by parol evidence a want of consideration for a promissory note, in an action between the original parties to it, or an illegality in the transaction, or a fraud practiced upon the party to be charged. Receipts are also exempt from the application of this rule. *Stackpole v. Arnold*, 150.
4. **COMPARISON OF HANDWRITING.**—A comparison of a disputed signature of a party to a written contract with other writings proved or admitted to be genuine is admissible as evidence. *Homer v. Wallis*, 169.
5. **GRANTOR'S DECLARATIONS.**—The declarations of the grantor, made prior or subsequent to the execution of the deed, not made in the presence of the grantee, are inadmissible to invalidate the deed. *Barrett v. French*, 241.
6. **FRAUD IN OBTAINING NOTE.**—It is competent for the defendant, in support of his defense to an action on a promissory note, to show that the note was given to the plaintiff in consideration that he would surrender certain accepted drafts of the defendant in plaintiff's favor, and that after

receiving the note, plaintiff refused to deliver up the drafts until a partial payment had been made thereon, the acceptances erased, and a receipt in full had been given to the acceptor. *Shepard v. Hawley*, 244.

7. **CORPORATION BOOKS.**—The general rule is that corporation books are evidence of the proceedings of the corporation; but then it must appear that they are the corporation books, and that they have been kept as such, and the entries made by the proper officer, or some other person in his necessary absence. It is not sufficient that the books are in the handwriting of one who appears from the entries therein, and in no other way, to have been the secretary. *Highland Turnpike v. McKean*, 324.
8. **PAROL DECLARATIONS.**—Parol declarations and admissions of a person in possession of land as to the true boundary line between his land and that of another are admissible in evidence. *Jackson v. McCall*, 343.
9. **PAROL EVIDENCE AS TO TESTAMENTARY PROVISION.**—A testator devised: "I give and bequeath to my beloved wife for and during her widowhood, the farm which I now occupy, together with the whole of the crops of every description which may be thereon at the time of my death;" and after her remarriage or death, he devised the same over to another. It was held that parol evidence was inadmissible to show that the testator intended to devise the whole of his real estate at W., and which included a farm of ninety acres held by one under a lease from the testator for seven years; and further that he gave such instructions to the attorney who drew the will, there being a mistake, and not a latent ambiguity. *Jackson v. Sill*, 363.
10. **GRANTOR'S DECLARATIONS AS AGAINST GRANTEE.**—Declarations made by the grantor at the time of executing a deed that he only did it for a sham, so that people could not come at it, are not evidence, if made in the absence of the grantee, unless a ground is previously laid by showing a trust, or his participation in the fraud. *Reichart v. Castator*, 402.
11. **CUSTOM.**—In trespass for cutting and carrying away his grain, a lessee for years may give evidence that by the custom of the country he is entitled to the way-going crop, though he does not specially plead such custom, and though he held under a written lease, making no reference to such right. A custom generally known is to be considered as entering into every contract to which it applies. *Stultz v. Dickey*, 411.
12. **COMPARISON OF HANDWRITING.**—Evidence from a comparison of handwriting, supported by other circumstances, is admissible. So, from a comparison of the types, devices, etc., of two newspapers, one of which is clearly proved, and the other imperfectly, the jury may be authorized to infer that both were printed by the same person. *McCorkle v. Binns*, 420.
13. **TESTIMONY OF WIFE.**—Upon an indictment for fornication and bastardy a married woman is a competent witness to prove the criminal connection with her. *Commonwealth v. Shepherd*, 449.
14. **PROOF OF LAWS.**—An edition of the laws published under the authority of the legislature is evidence, as well of the private as of the public laws it contains. *Biddis v. James*, 456.
15. **PROOF OF EXECUTION OF WILL.**—A will of land which has accompanied the possession thirty years, is evidence without proof of its execution. *Shaller v. Brand*, 482.

16. **RELEASE OF DOWER.**—If a writing be put in evidence in which there is an admission of the survivorship of the wife, and her being then living, and that she had released dower, it is evidence that the right of dower is extinguished. *Id.*
17. **DECLARATIONS OF GRANTOR.**—Declarations made by the grantor to the grantee after the execution of a deed of trust but before the grantee had accepted it, are evidence to alter or contradict the trust. *Drama v. Simpson*, 490.
18. **PAROL EVIDENCE TO VARY DEED.**—Parol evidence is not admissible to show that half an acre of land, included in an administrator's deed, was excepted at the time of sale. *Snyder v. Snyder*, 493.
19. **PROOF OF EXECUTION.**—An execution cannot be proved by parol; it must be shown by the records. *Id.*
20. **LEADING QUESTIONS.**—A question so framed as to indicate the answer desired is a leading one. Hence, a witness cannot be asked, "Did he assign to you as a reason why he would not bid more for the Isle of Cae, that he could buy W.'s land for," etc. *Id.*
21. **HANDWRITING.**—The testimony of a witness as to the contents of a letter is inadmissible, where it appears that the witness had never seen the alleged author of the letter write, and had no knowledge of his handwriting. *Dorsey v. Dorsey*, 506.
22. **DECLARATIONS RESPECTING TITLE.**—Though, as a general rule, a party's own declarations cannot be admitted to defeat a prior deed, yet the declarations of a man respecting his title, made before he parts with his estate, are evidence against him and all claiming under him. *Id.*
23. **INADMISSIBLE.**—Parol evidence is not admissible to show that the condition upon which the price of a house was to be paid was different from the purport of the note given for the price. *Gatlin v. Kilpatrick*, 557.
24. **INADMISSIBLE TO EXPLAIN MISTAKE IN WILL.**—Parol evidence, even of the person who drew the will, though of unimpeachable character, is not admissible to prove a mistake, showing that the testator intended to dispose of the property in a different manner than appeared from the face of the will. *Rothmahler v. Myers*, 613.
25. **VENDOR'S DECLARATIONS.**—The declarations of a party made subsequent to a sale or transfer of property, and which go to take away a vested right, are inadmissible in evidence. *Brashear v. Burton*, 634.
26. **PRESUMPTION OF PERFORMANCE.**—Lapse of time is presumptive evidence of the performance of a covenant to deliver property, as well as of one for the payment of money; and whether the circumstances of the case rebut such presumption, is a question for the determination of the jury. *Phillips v. Morrison*, 638.
27. **EVIDENCE OF GENERAL CHARACTER.**—In an action of trespass for an assault and battery, the plaintiff ought not to be permitted to give evidence of his general character. *Givens v. Bradley*, 646.
28. **GENERAL EXPRESSIONS, OPERATION OF.**—The operation of general expressions in an obligation cannot be restrained by parol proof of the understanding between the parties. *Kelly v. Bradford*, 656.
29. **PATENT AMBIGUITY.**—The omission in a promissory note of the sum to

be paid, is a patent ambiguity, which cannot be explained by parol, but the payee must resort to the original contract, treating the note as a nullity. *Brown v. Bebee*, 728.

See COVENANTS, 4; DEEDS, 9.

## EXECUTORS AND ADMINISTRATORS.

### 1. ANCILLARY ADMINISTRATION—LIABILITY OF ADMINISTRATOR TO ACCOUNT.

—An administrator, with the will annexed, purchased and took an assignment to himself, in his individual capacity, from the assignees, to whom the deceased, being a bankrupt, had, in his life-time, assigned all his property to pay his debts. The assignment to him was of all their right and title in the assignment from the deceased. There was a surplus after satisfying the debts, which in the first assignment was agreed to be paid to the assignor. It was held lawful for the assignees to reassign; and the reassignment to the administrator, though made to him individually, had the effect only of a release or discharge by the assignees of the deceased from their demands under the assignment, and so was to be considered a reconveyance to the administrator in his representative capacity, and therefore the money recovered by such administrator, under such assignment became assets in his hands, for which he should account. *Daves v. Boylston*, 72.

### 2. AGREEMENTS TO SELL BY EXECUTORS, HOW REGARDED.—The rule of equity is to discountenance bargains of hazard. Hence, if an agreement of sale by an executor be equivocal, the court should be inclined to consider it a sale by the acre, and not by the tract, it being a dangerous principle that executors or other fiduciaries should take upon themselves, by means of bargains of hazard, to jeopardize the interests confided to their care. *Nelson v. Carrington*, 519.

### 3. RENUNCIATION BY EXECUTORS.—A testator, in the year 1784, having directed that his executors should sell all his real and personal estate for the payment of his debts, and having appointed four executors, three of whom qualified, a sale in 1794, by two of the acting executors, was held valid, and the third executor (as well as the fourth, who never qualified) was presumed to have renounced his right to administer, at the date of the sale. *Id.*

### 4. EXECUTOR OMITTING TO PLEAD.—An executor or administrator omitting to plead, but allowing judgment by default, will not thus be held to an admission of assets, so as to make him personally liable. The court will give him an opportunity of showing the fact, and decide accordingly. *Lenoir v. Winn*, 597.

### 5. LIABILITY OF ADMINISTRATOR TO CREDITORS.—An administrator paying debts out of their legal order or proportion is liable to creditors, and is not allowed to retain more than his proportion of the debts due to himself. *Id.*

### 6. LIABILITY FOR INTEREST.—Executors and administrators are bound to pay interest on moneys of the estate received and not applied in due time to the payment of the debts of the estate. *Id.*

### 7. LIABILITY FOR EACH OTHER'S ACTS.—Executors and administrators are not liable for each other's acts unless there be connivance or gross negligence. *Id.*

8. **LIABILITY FOR NOT PAYING JUDGMENTS.**—Where the administrator neglected to pay a judgment-debt due by his intestate, and having paid inferior debts, and when a surety on a bond was obliged to discharge such judgment-debt, the administrator was held liable to satisfy, out of his own estate, such surety as a judgment-creditor. *Id.*
9. **LEGACY TO EXECUTOR.**—If a legacy be given to an executor in that character, he cannot take it unless he qualifies as such executor. *Rothmaller v. Myers*, 613.

#### FACTORS.

**OWNER'S RIGHT.**—A sale by a factor creates a contract between the owner and the purchaser, and payment may be made to the owner against the orders of the factor. Accordingly, when the captain of a stranded vessel employed auctioneers to sell the cargo saved, which they did, and contrary to his directions, paid the proceeds to the owners, reserving the amount due the captain for freight, such payment was held good. *Golden v. Levy*, 555.

#### FEMES COVERT.

1. **LIABILITY OF WIFE'S SEPARATE ESTATE.**—The husband, acting as manager of the separate trust estate, purchased a saw-gin for the use of the estate, of which it had the benefit. The husband gave his own note for the gin, and under a belief that he was the owner of the property, the vendor sued him on the note, but found him insolvent. The wife's trust estate was held liable in equity for the price of the gin. *Cater v. Eveleigh*, 596.
2. **WIFE'S TRUST ESTATE CHARGED.**—Where supplies are furnished for the benefit of the wife's trust estate, such estate is chargeable in equity with payment therefor. *James v. Mayrant*, 630.
3. **POWER EXECUTED BY.**—A *feme covert* executrix may execute a power without her husband, and her deed as executrix for lands devised to be sold, is valid, although she is not privately examined. *Tyree v. Williams*, 663.

See ACKNOWLEDGMENT, 2, 3; EVIDENCE, 13.

#### FOREIGN JUDGMENTS.

1. **FOREIGN JUDGMENT—VALIDITY OF.**—An inquiry as to the jurisdiction of a court, rendering a judgment in a foreign state, may be made, when a party in another state seeks to enforce such judgment. If the court had jurisdiction of the cause, it is, however, open to an inquiry on the merits. *Bissell v. Briggs*, 88.
2. **JUDGMENT OF ANOTHER STATE.**—The record of a judgment of any court of a sister state, when produced here, is not conclusive as to jurisdiction; for to be entitled to the full faith and credit mentioned in the constitution, the court must have had jurisdiction of the parties as well as of the subject-matter. *Id.*
3. **JURIS—CONCLUSIVENESS.**—A record, duly authenticated, of the proceedings of a court of competent authority, in one of the states, is conclusive evidence in the courts of another to show that a judgment was rendered, and the obligation of the party to pay the amount recovered; but it may be opposed by proof of fraud or collusion, or of subsequent payments or discounts. *Buford v. Buford*, 511.

4. **FOREIGN ADMIRALTY SENTENCE.**—The sentence of a foreign court of admiralty is conclusive as to the national character of the ship. *Blanque v. Peytavin*, 705.

### FORGERY.

See **CRIMINAL LAW**, 11.

### FRAUD.

- PURCHASE WITH NOTICE OF PRIOR DEED.**—Where a subsequent purchaser whose deed is registered at the time of his purchase, has notice at the time of a prior unregistered deed, his deed will be postponed to such deed; and a purchase so made will be deemed fraudulent, the question of notice and fraud in such case being cognizable in law as in equity. *Jackson v. Burgett*, 349.

### FRAUDULENT CONVEYANCES.

- WHO MAY IMPEACH.**—A party or his heirs cannot in law or equity have his contract set aside on the ground of it being fraudulent on his part; nor does his administrator, even in the case of an insolvent estate, so far represent the creditors as to have a right to set aside such contract; this right belongs to the creditors solely. *Peaslee v. Barney*, 743.

See **DEEDS**, 11.

### GENERAL AVERAGE.

- WAGES AND PROVISIONS WHEN NOT IN.**—A ship was insured "at and from New York to Liverpool, and at and from thence back to New York." On the voyage out she was so damaged as to be obliged at Liverpool to go into dock for repairs, where she was detained from the first of December till the following March. The cargo having been delivered and freight earned before the first of December, it was held that the wages of the master and crew and provisions were not general average, nor were the insurers liable for them. *Dunham v. Commercial Ins. Co.*, 374.

### GIFTS.

- WHAT NECESSARY TO CONSTITUTE.**—Delivery is essential to complete the gift of a chattel, except where it is granted by deed, or is incapable of manual delivery. Accordingly, where a father, the day after the death of his son, relinquished to his son's widow all the right which he had to a distributive share of his son's estate, but without deed or delivery, and in the absence of the widow, it was held that the father might still recover such distributive share. *Bullock v. Tinnem*, 563.

### HIGHWAYS.

- RIGHT IN.**—After a highway had been laid out and established pursuant to law, the owner of the land conveyed the same with the usual covenants of warranty and seisin, "saving and excepting the said highway." It was held that the right of soil in the highway vested in the grantee, subject to the right of passage in the public, and that he could maintain trespass *quare clausum fregit*, against a stranger for the continuance of a shop, erected by him on a part of the highway not used for traveling before the conveyance was made. *Peck v. Smith*, 216.

## HUSBAND AND WIFE.

1. **LIABILITY OF WIFE**—An indictment will not lie against a *feme covert* for an assault and battery, committed in the company and by the command of her husband. *Commonwealth v. Neal*, 105.
2. **HUSBAND'S LIABILITY FOR NECESSARIES.**—Where a wife leaves her husband, not by reason of her adultery, the husband cannot be held liable for necessities supplied to her, though the person who gave her credit, was ignorant of her elopement; but if she offers to return, and the husband refuses to receive her, his liability is then revived, notwithstanding a general notice not to trust her. *McOutchen v. McGahay*, 373.
3. **EVIDENCE AS TO NON-ACCESS.**—If the husband has access to his wife, no evidence short of his absolute impotence can bastardize the issue; but if they live at a distance from each other, so that access is very improbable, the question of the legitimacy may be decided on a consideration of all the circumstances. *Commonwealth v. Shepherd*, 449.

See **FEMES COVERT.**

## INCUMBRANCES.

See **EQUITY, 2; REAL ESTATE, 9.**

## INFANCY.

1. **LIABILITY OF INFANT.**—An infant gave his promissory note for a valuable consideration, but not for necessities, and paid a part before his coming of age. After coming of age, he made a will and therein directed his just debts to be paid. In a suit against the executors, they were held not liable to pay the balance due. *Smith v. Mayo*, 28.
2. **PROMISE BY INFANT—RATIFICATION.**—An infant having for a sufficient consideration bound himself, after coming of age said to a third person: "I owe you and Mr. M. (the plaintiff), and when I return from this voyage I will pay you both," and at another time said to the plaintiff, when payment was asked, that he was not then able for want of money, but after his return from a voyage he would settle. There was no evidence of any other dealings between the parties. This was held to amount to a ratification of his promise to pay after coming of age. *Martin v. Mayo*, 103.
3. **ENLISTMENT OF MINORS.**—The statutes of the United States, which prohibit the enlistment of a minor without the consent of his parent, etc., "if any he have," prohibit the enlistment of minors who have no parent, guardian or master; and such enlistment, if not void, is voidable at the request of the minor so enlisted. *Commonwealth v. Cushing*, 156.
4. **LIABILITY OF INFANT.**—A minor having received money from the plaintiff, made a promise in writing to repay the amount to the plaintiff's daughter; and after coming of age, when applied to by the daughter's husband, said, that it was not then convenient for him to pay it, but that on his arrival at the plaintiff's place of residence, whither he was then bound, he should pay the money due him. It was held that no action could be maintained by the plaintiff on the express promise, but that on this evidence a general *indebitatus assumpsit* for money received to the plaintiff's

use, might be maintained, as the evidence was sufficient to revive the debt and establish a consideration on which the law will imply a promise. *Jackson v. Mayo*, 107.

### INSOLVENT LAWS.

1. **DISCHARGE UNDER FOREIGN INSOLVENT LAW.**—A discharge under the insolvent laws of Rhode Island of a citizen of that state, is not a bar to an action here, upon a judgment recovered in Rhode Island against such debtor, the creditor being a citizen of this state, and the debt originally accruing here. *Watson v. Bowne*, 129.
2. **ASSIGNMENT, WHEN FRAUDULENT.**—An assignment executed by an insolvent debtor with an understanding that part of the property assigned shall be conveyed to trustees for the use of his family, is, so far as it respects the property conveyed in trust for the family, fraudulent and void as to all creditors who do not assent to the arrangement, and the non-assenting creditors may take it in execution. *McAllister v. Marshall*, 458.

See CONFLICT OF LAWS, 1, 3, 4.

### INSURANCE—MARINE.

1. **COMMENCEMENT OF RISK.**—An insurance was made on a vessel for one year, "commencing the risk at B, on a day certain at noon," and it happened the vessel had left the port of B. on the day preceding, but was in good safety at sea on the day fixed, and was afterwards lost within the year. The underwriters were held, nevertheless, liable. *Manly v. United Marine, etc. Co.*, 40.
2. **CONSTRUCTION OF CLAUSE IN POLICY.**—In a policy of insurance on a ship from New Bedford to Charleston, with liberty to touch at Savannah, and at or from thence to a port or ports in Great Britain, was the stipulation: "In case of capture or detention the assured shall not abandon short of six months after notice thereof shall be given to the underwriters, unless sooner condemned." While the ship lay at Savannah, the United States imposed an embargo on all ships and vessels for ninety days, and before the expiration of the ninety days declared war against Great Britain. After the embargo took place, the assured gave notice thereof, and in six months afterwards abandoned to the underwriters, having in the meantime returned to New Bedford. It was held that the restraint or detention not having continued for the term of six months, the assured was not entitled to recover as for a total loss. *Delano v. Bedford Ins. Co.*, 132.
3. **ADJUSTMENT OF PARTIAL LOSS.**—In estimating the amount of loss in case of repairs, the insurers are entitled to a deduction of one third new for old, without regard to the fact that the vessel was new, and on her first voyage, this being the established usage in New York. *Dunham v. Commercial Ins. Co.*, 374.
4. **DEVIATION—WHEN EXCUSED.**—Where a vessel is compelled to anchor in a port not described in the policy, by the military power of a belligerent, it is no deviation. *Savage v. Pleasants*, 424.
5. **ILLICIT TRADE—WHEN NOT A BREACH.**—Where a trade is in no other way unlawful than in consequence of an accident over which the insured

has no control, the underwriters cannot avail themselves of it as a breach of warranty. *Id.*

6. **BREAKING UP OF VOYAGE.**—Where a voyage is broken up by reason of an event over which the insured has no control, he may abandon for a total loss. *Id.*
7. **NOTICE OF ABANDONMENT.**—Unless the insured avail themselves of the right to abandon within a reasonable time after notice of the breaking up of the voyage, a recovery can only be had for a partial loss. *Id.*
8. **APPORTIONMENT OF FREIGHT.**—Freight is susceptible of apportionment as between the owners and the insurers, so as to give to each of the parties the usufruct of the ship during the time of their respective ownership. *Kennedy v. Baltimore Ins. Co.*, 499.

See **BARRATRY.**

### INTEREST.

1. **LIABILITY FOR.**—A party who has fraudulently obtained or wrongfully detained the money of another, is liable for interest from the time of his so obtaining or detaining the same. *Wood v. Robbins*, 182.
2. **WHEN ALLOWED.**—In an action of book-debt for certain advancements made by the plaintiff for the defendant's use, where it appeared that there had been no mutual dealings between the parties, that the debt was due, and that payment had been unreasonably delayed, it was held interest was allowable, though the account was unliquidated, and there had been no agreement to pay interest, nor any particular custom under which it could be claimed. *Selleck v. French*, 185.
3. **RECOVERY OF.**—Interest is recoverable against a person intrusted with the collection of money, who retains and converts it to his own use, from the time when the same ought to have been paid over. *People v. Gasherie*, 263.
4. **ON RENT.**—Rent carries interest from the time it is due, unless from the conduct of the landlord it may be inferred that he does not mean to insist on it, or unless he acts in an oppressive manner by demanding more than is due, where the tenant is willing to do justice, or there are other equitable circumstances making the charge of interest improper. *Obermyer v. Nichols*, 439.
5. **ON JUDGMENT.**—A judgment upon which it is agreed that no execution shall issue until the plaintiff has perfected his title to certain land for which the bond that supported the judgment was given, carries interest *Shaller v. Brand*, 482.

See **EXECUTORS**, 6.

### JOINT-TENANCY.

- CONVEYANCE BY JOINT-TENANT.**—One joint-tenant cannot convey a part of the joint estate by metes and bounds to a stranger. One entering under such a conveyance cannot become a disseisor of the other joint-tenants; for one joint-tenant cannot be disseised by a stranger unless all are disseised. The grantor could not be disseised, as the grantee entered by his consent. The grantee in such a conveyance, therefore, gains no seisin, either by right or by wrong. *Porter v. Hill*, 22.

## JURY.

1. **SUMMONING JURY.**—In a precept to the sheriff to summon the grand and petit jury, it is sufficient to command him to cause to come before the judges twenty-four good and lawful men, without commanding him in what manner they are to be drawn or selected. *White v. Commonwealth*, 443.
2. **JURORS FROM BODY OF COUNTY.**—A precept to the sheriff, commanding him to cause to come, etc., "twenty-four good and lawful men, of the body of the county of C., aforesaid, then and there to inquire, present, do and perform such things as on behalf of the commonwealth shall be enjoined them," and also a competent number "of sober and judicious persons, and none other, as jurors for the trial of all issues," etc., contains no command to convene the petit jurors from the body of the county of C.; and therefore, if it does not appear by the return or the panel, that the petit jurors, in fact, came from the body of the county, the error is fatal. *Id.*

## LEASES.

- AGREEMENT CONSTITUTING.**—A memorandum of agreement recited that a farm was let for a certain yearly rent in wheat during the lives of the lessee and his wife, the place to be surveyed at a certain time thereafter, when a lease would be formally made. The lessee held possession for fourteen years, paying the yearly rent. This was held to amount to a lease or present demise; and that an interest having passed under it, parol evidence of a disclaimer was inadmissible. *Jackson v. Kisselbrack*, 341.

## LEGACIES.

1. **LIABILITY OF DEVISEES TO PAY.**—A testator devised his real and personal estate to his two sons for life, giving his wife an annuity of fifty dollars during her widowhood, directing his said sons to pay such annuity so long as she should continue his widow, and which annuity was to be in lieu of dower. The devisees took possession of the estate, paid the widow on account of the legacy seventy-five dollars, and thereafter refused to pay her more. They were held liable to pay her the annuity, for the acceptance of the estate devised, and part payment was equivalent to an express promise to pay. *Van Orden v. Van Orden*, 314.
2. **DOWER BARRED BY ACCEPTANCE OF.**—The acceptance of the legacy by the widow under the provision of the will was held to bar her dower in equity; and that the payment of part, and the recovery of judgment for the residue remaining due, would be a good plea in bar at law to an action for her dower, as it was conclusive evidence of an election. *Id.*
3. **CUMULATIVE LEGACY, WHAT.**—Where the same sum of money is given twice to the same legatee, in the same writing, he can take only one of the sums bequeathed; the latter sum is presumed to be a substitution of the former, and it is incumbent on the legatee to rebut this presumption and show a contrary intention. But where the two bequests are in different instruments, as by will in the one case and by a codicil in the other, the presumption is in favor of the legatee's taking both sums. *Dewitt v. Yates*, 328.

4. **EVIDENCE OF TESTATOR'S INTENTION.**—The presumption in either case, whether against the cumulation, because the legacy is repeated in the same instrument, or in favor of it, because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence and the circumstances of the case.
5. **LAPSE OF LEGACY IN RESIDUUM.**—Where the will is so obscure that the court cannot discern the intention of the testator, the legacy fails, and the property will pass under the residuary clause. *Rothmahler v. Myers*, 813.
6. **WHEN LEGACY DOES NOT LAPSE.**—A husband bequeathed certain slaves to his wife for life, and after her death to his nephews; it was held that, by the death of one of the nephews in the life-time of the wife, his legacy did not lapse, but descended to his heir at law. *Coleman v. Hutchenon*, 649.

See CONFLICT OF LAWS, 2; EXECUTORS, 9.

### LIBEL.

1. **AVERMENTS NOT NECESSARY TO BE PROVED.**—A declaration in libel, after stating the plaintiff's good name, etc., then averred that the defendant, well knowing the premises, etc., maliciously intending to injure the plaintiff and bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty of the crime of treason and of the promulgation of treasonable sentiments, etc., published the libel. It was held that these were merely suggestions as matter of inducement, and unnecessary to be proved. *Coleman v. Southwick*, 253.
2. **EVIDENCE OF ANOTHER'S DECLARATIONS.**—Where a party published a libel taken from a paper, as an extract from another paper, in an action by the publisher of the paper against the party publishing the alleged libel, it was held that the testimony of a witness that he had heard the defendant ask another if he had not seen the alleged matter published in the plaintiff's paper was inadmissible in mitigation of damages, being in the nature of secondary and inferior evidence. *Id.*
3. **PUBLICATION OF LIBEL.**—The publisher of a libel is liable to a party libeled, notwithstanding the libel is accompanied with the name of the author. *Doyle v. Lyon*, 346.
4. **WORDS CONSTITUTING A LIBEL.**—To print and publish of one "that he has been deprived of a participation of the chief ordinance of the church to which he belongs, and that too by reason of his infamous, groundless assertions," is a libel. So is any malicious printed slander which tends to expose a man to ridicule, contempt, hatred or degradation of character. *McCorkle v. Binns*, 420.

### LIEN.

**PRIORITY OF STATE'S CLAIM.**—If the state take a particular security or mortgage, it is not thereby deprived of its general priority in cases to which it is entitled by law. *Lenoir v. Winn*, 597.

### MANDAMUS.

**RIGHT TO.**—Mandamus will not lie to compel the managers of an election of sheriff to return a candidate duly elected, after they had certified to the governor that the election was null and void. *State v. Bruce*, 577.

## MARTIAL LAW.

**POWER TO PROCLAIM.**—The power of the president, under the constitution, to call out the military forces of any part of the Union, in case of invasion, may be exercised by his delegate, as a commanding officer in a particular district, and all citizens, subject to militia duty, may be thereby placed under military law, but this is the extent of martial law, and all beyond it is usurpation. *Johnson v. Duncan*, 675.

## MESNE PROFITS.

**RECORD OF JUDGMENT IN EJECTMENT AS EVIDENCE.**—In an action for mesne profits, the record of the judgment in ejectment is conclusive evidence that the defendant was in possession at the time the ejectment was brought, and also as to title during the whole time laid in the demise, but it is not evidence of the length of time that the defendant was in possession. *Bailey v. Fairplay*, 486.

## MONEY HAD AND RECEIVED.

See ACTION, 1, 2.

## MORTGAGE.

1. **INTERESTS OF MORTGAGOR AND MORTGAGEE.**—At law, as in equity, a mortgage is recorded merely as a security, and the mortgagee has but a chattel interest. The freehold is in the mortgagor. *Runyan v. Mercereau*, 393.
2. **TRESPASS, RIGHT TO MAINTAIN.**—The mortgagor, or the purchaser, or assignee of the equity of redemption, may maintain trespass against the mortgagee or a person acting under his license. *Id.*
3. **ASSIGNMENT OF MORTGAGE.**—A mortgage may be assigned by mere delivery, without writing. *Id.*
4. **ESTOPPEL OF MORTGAGEE.**—If a mortgagee, in consequence of assurances that he shall receive his money from another quarter, permit the mortgagor to sell the premises, without making known his claim, the purchaser will be protected, notwithstanding the fund from which the mortgagee expected payment fail. *Taylor v. Cole*, 528.

## MURDER.

See CRIMINAL LAW, 5.

## NEGOTIABLE INSTRUMENTS.

1. **INSOLVENCY AFFECTING DEMAND.**—A demand by the holder upon the maker of a promissory note, and notice to the indorser, are not excused in a case where the promisor becomes insolvent after the assignment, and continues so until and at the time the note falls due. *Crosen v. Hutchison*, 55.
2. **SPECIAL INDORSEMENT—EFFECT OF.**—An indorsement of even date on the back of a negotiable promissory note, in the words: "For value received, we, jointly and severally, undertake to pay the money within mentioned to the said" payee, renders the indorsers severally liable as original promisors. *White v. Howland*, 71.

3. **MONEY PAID UNDER MISTAKE.**—The indorser of a promissory note, ignorant that a demand had not been duly made on the maker, nor due notice given, paid the amount to a bank where it was left by the holder for collection, which amount was passed to the holder's credit by the bank. Within three days, the indorser, having discovered his mistake, and the money not yet having been paid over, reclaimed it from the company. It was held the indorser could recover the money from the bank, although after the reclamation they had paid the amount to the holder. *Garland v. Salem Bank*, 86.
4. **BILL PAID FOR HONOR—DUTY OF HOLDER.**—When a bill of exchange is protested for non-acceptance, and afterwards taken up and paid for the honor of a party, the holder is still bound to the same duties, as to protest and notice, as if the bill had not been paid. *Lenox v. Leverett*, 97.
5. **DEMAND AND NOTICE.**—The maker's insolvency, although known to the indorser, does not excuse the holder of a promissory note from demand and notice. *Sandford v. Dillaway*, 99.
6. **SIGNATURE BY AGENT.**—Where a promissory note was subscribed "Pro W. G.—J. S. C.," it was held to be binding on the principal if the person signing as agent had authority, otherwise, the latter was personally liable. *Long v. Colburn*, 160.
7. **MATERIAL ALTERATION OF NOTE.**—The procuring of a person not present at the making of a promissory note, to put his name thereto as a witness, is a material alteration of such note. *Homer v. Wallis*, 169.
8. **INDORSEMENT BY ONE NOT A PAYER.**—A payee agreed for the sale of land, and engaged to give in part consideration his promissory note, with a sufficient indorser or surety. At the time of the conveyance he gave his own promissory note, and subsequently a party put his name on the back of the note, as he said, to satisfy the holder, but disclaiming any liability. The latter was held liable as an original promisor. *Moses v. Bird*, 179.
9. **NOTICE TO JOINT INDORSERS.**—Where a note or bill is made payable to two or more, not partners, and by them jointly indorsed in their individual names, each must have notice of non-payment. *Shepard v. Hawley*, 244.
10. **DEMAND NECESSARY AFTER MATURITY.**—An indorsee of a promissory note overdue is still bound to prove demand and notice in the same manner as he would if he received the note before maturity. *Berry v. Robinson*, 267.
11. **PROMISSORY NOTE TAKEN IN PAYMENT.**—A promissory note of a third person is no payment of a debt, unless the creditor agrees to take it absolutely as payment. And where a note was taken as payment, and a receipt in full given by the vendor, it was held a question of fact for the jury, whether there was such a special agreement or not. *Johnson v. Weed*, 279.
12. **RECEIVING NOTE IN PAYMENT.**—If a vendor of goods at the time of sale receive from the purchaser the note of a third person (such note not being forged, and there being no fraud on the part of the purchaser), such note will be deemed to have been accepted by the vendor in payment

and satisfaction, unless the contrary be expressly proved. *Whitbeck v. Van Ness*, 383.

13. **INSOLVENCY OF MAKER.**—Ordinarily, if the maker of a note has become insolvent, has absconded, or refused to make payment, this will be sufficient to charge the indorser upon due notice of the fact. *Sullivan v. Mitchell*, 546.
14. **PERSONAL DEMAND UNNECESSARY.**—A personal demand on the maker is not necessary. It is sufficient if made at his house; but if the house be closed and the maker absent, some endeavors must be made to find him. *Id.*
15. **NOTE PAYABLE AT A PARTICULAR PLACE.**—Whenever a bill or note is made payable at a particular place, a demand at that place is sufficient, and a personal one is not necessary, whether the maker live at the same place or a different one. *Id.*
16. **NOTE PAYABLE AT A BANK.**—A note made payable at a particular bank must be presented at the bank for payment to render the indorser liable. *Id.*
17. **INSOLVENCY EXCUSING NOTICE.**—The reputed insolvency of the drawer will not necessarily excuse demand and notice. The insolvency which may excuse want of notice, or which may be equivalent to notice, must be such an absolute and notorious insolvency as leaves no doubt of the fact. *Kiddell v. Ford*, 569.

#### NEW TRIAL.

**DAMAGES IN TORT.**—In actions for slander, libel, and other personal torts, the court will not grant a new trial on the ground of excessive damages, unless the amount is so flagrantly outrageous and extravagant as manifestly to show that the jury must have been actuated by passion, partiality, prejudice or corruption. *Coleman v. Southwick*, 253.

#### NOTICE.

1. **SALE OF LAND BY PAROL.**—A parol sale of land, where the consideration is paid and possession delivered, is good as between the parties; but to make it valid as to a *bona fide* purchaser, there must be clear evidence of notice to him, either actual or legal. Legal notice exists only where there is a violent presumption of actual notice. *Billington v. Welsh*, 406.
2. **LEGAL NOTICE.**—Undisturbed possession by the equitable owner has generally been considered legal notice; but it must be a clear, unequivocal possession. Accordingly, where A. bought by parol from B. a corner of B.'s tract, paid for it, was put into possession, and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to a certainty, and on B.'s own part there was a forge, dwelling-house, grist and saw-mill, and other buildings, which, together with A.'s buildings, might be taken as one establishment, the possession of A. was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against B. *Id.*
3. **CONSTRUCTIVE NOTICE.**—Extra-judicial proceedings do not operate as constructive notice; but express notice obtained from such proceedings will operate against a purchaser, relying on the want of notice. *Hart v. Hawkins*, 666.

See PARTNERSHIP, 5; PRINCIPAL AND AGENT, 2.

## OFFICERS.

1. **OFFICERS DE FACTO RECOGNIZED.**—In an action between other parties, the court will not decide whether a person claiming to be a sheriff of a county, and actually discharging the duties of the office, be sheriff *de jure*. *Fowler v. Bebee*, 62.
2. **JUDICIAL LIABILITY.**—If the preliminary requisites to obtaining a search warrant be omitted, or if the warrant be general, the proceeding is *coram non judge*, and the magistrate who issues the warrant, and the officer who executes it, are liable in trespass to the party injured. *Grason v. Raymond*, 200.
3. **LIABILITY OF PUBLIC OFFICER TO REFUND.**—Where a collector levied a tonnage duty illegally, and the same was paid compulsorily, it was held he was liable to refund the amount, notwithstanding he had paid over the money to the government, and no notice was given him not to pay over the money so collected. *Ripley v. Gelson*, 271.
4. **LIABILITY FOR JUDICIAL ACTS.**—Where the chancellor committed one of the officers of the court of chancery for malpractice and contempt, and a judge of the supreme court in vacation on *habeas corpus* discharged the prisoner, and the chancellor afterwards recommitted him for the same cause, it was held that the chancellor was not liable to an action at the suit of the officer for the penalty given by the *habeas corpus* act; for a judge of a court of record is not liable to answer personally, in a civil suit, for any act done by him in his judicial capacity, nor for errors of judgment. *Yates v. Lansing*, 290.
5. **INSPECTORS OF ELECTION REFUSING VOTE.**—Officers required by law to exercise their judgment, are not liable for mistakes in law, when their motives are untainted with fraud or malice. Hence, an action on the case will not lie against the inspectors of an election for refusing the vote of a person legally qualified to vote, without alleging and proving fraud or malice on the part of such officers. *Jenkins v. Waldron*, 359.
6. **MUNICIPAL OFFICERS INDICTABLE FOR NEGLIGENCE.**—Town commissioners, who are invested with power to levy taxes to keep the streets in order, are liable to indictment for culpable omission and neglect to repair the streets. *State v. Commissioners*, 567.

## PARTITION.

**PARTITION BY PAROL.**—Where a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet, where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition and subsequent possession will not be sufficient to transfer the title. *Jackson v. Vosburgh*, 276.

## PARTNERSHIP.

1. **POWER OF PARTNER AFTER DISSOLUTION.**—After the dissolution of a copartnership, one of the partners cannot bind the others without their consent by settling accounts with or allowing credits to, customers of the firm. *Rootes v. Wellford*, 510.
2. **IDEM.**—After the dissolution of a partnership, the admission of a debt by one partner is not sufficient of itself to charge the other partners, and ac

act can be done by one which is binding on the rest, except under special circumstances. *Chardon v. Oliphant*, 572.

3. **PARTNERSHIP LANDS—SURVIVORSHIP.**—The title to the land obtained in the name of one of the partners, the other having died, and a sale made by him, to persons with notice, does not affect the rights of the heirs of the other partner; the right does not survive: *Hart v. Hawkins*, 606.
4. **PARTNER CANNOT DENY HIS AUTHORITY.**—A partner entering into a contract in the name of the firm, cannot be admitted to say that he was not authorized to make it. *Smith v. Kemper*, 708.
5. **NOTICE TO ONE PARTNER.**—Notice to one of the partners of a firm, of a prior unrecorded deed, is notice to all the partners, and will render void a subsequent conveyance of the same land to the firm. *Barney v. Currier*, 739.

#### PATENTS—LAND.

1. **FIRST PATENT ISSUED, PRIORITY OF.**—Where a patent had been issued, and afterwards a second, which recited a mistake in the issuing of the first, it was held that the first was conclusive as to the title until it was set aside by a proper proceeding instituted for that purpose. *Jackson v. Lawton*, 311.
2. **VALIDITY OF PATENT, HOW DETERMINED.**—If a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appear on the face of the patent itself, it is not void, but voidable only by a suit for that purpose. *Id.*

#### PERSONAL PROPERTY.

1. **PROPERTY IN WILD ANIMALS.**—An action of trover will lie for wild geese which have been tamed and strayed away, but without regaining their natural liberty. *Amory v. Flynn*, 316.
2. **OBLIGATION OF JOINT-OWNER.**—A joint-owner is bound to that care which prudent men ordinarily have of their property. *Guillot v. Desaut*, 702.

#### PLEADING AND PRACTICE.

1. **PLEADING WRITTEN INSTRUMENT.**—In an action upon a written contract, it is not necessary to set forth in the declaration the precise words of the contract; it is sufficient to declare according to their legal import and effect. *Lent v. Padelford*, 119.
2. **PLEADING PROMISE.**—Where the declaration alleges a promise by the defendant, in consideration of the performance of some act by the plaintiff, an averment of such performance on the part of the plaintiff is sufficient, without alleging a promise by him or other assent to the contract. *Id.*
3. **PLEADING NOTICE.**—It is unnecessary to allege notice to the defendant of matters equally within the knowledge of the plaintiff and defendant. *Id.*
4. **PLEADING CONTRACT.**—In actions founded on contracts, the contract must be set out either in *hæc verba*, or according to the leading effect; and contracts being in their nature entire, if the contract proved, and that declared upon be different in any part, the variance is fatal. *Wales v. Gilmor*, 502.
5. **IDEM.**—Whatever is alleged as inducement and is not impertinent and foreign to the cause, must be proved as alleged, and when a contract is

alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter. *Id.*

6. PROSECUTION OF ONE OR MORE DEFENDANTS IN TORT.—In trespass against several defendants, the plaintiff may proceed to trial, as to one or more, without entering a *nolle prosequi* as to the defendants who have not been served with process, and who have not appeared. *Givens v. Bradley*, 646.

See LIBEL, 1.

#### POWERS.

See FEMES COVERT, 3.

#### PRINCIPAL AND AGENT.

1. LIABILITY OF PUBLIC AGENT.—A public agent is not personally liable on a contract made in the name and on behalf of the government; but if he denies to the government that such contract has been made, and thereby deprives the party of his remedy against the government, the agent is personally liable, as he has disavowed his character of public agent. And if the agent has received from the government money for the satisfaction of the contract, and has not so applied it, he is liable in an action for money had and received. *Freeman v. Otis*, 66.
2. NOTICE TO AGENT.—If a subsequent purchaser have notice at the time of his purchase of a prior unregistered deed, it is the same to him as if such deed had been registered; and if the agent of such subsequent purchaser, at the time of making the purchase, knows of the prior or unregistered deed, it is the same as notice to his principal. *Jackson v. Sharp*, 268.
3. NOTICE UNNECESSARY.—Notice to an agent not to pay over the money to his principal is not necessary where the payment is compulsory, and it is not made expressly for the use of the principal. *Ripley v. Gelston*, 271.
4. PERSONAL LIABILITY OF AGENTS.—A bond was executed by certain parties, who were described as "Trustees of the Baptist Society of the town of R;" but they executed it in their individual names and by their seals. They were held personally liable, and the designation affixed was mere *descriptio personarum*. *Taft v. Brewster*, 280.

See NEGOTIABLE INSTRUMENTS, 6.

#### QUESTIONS OF LAW AND FACT.

1. FRAUD A QUESTION OF LAW.—Fraud is a question of law, especially when there is no dispute about facts. It is the judgment of law on facts and intents. *Sturtevant v. Ballard*, 281.
2. CAUSE OF LOSS A QUESTION OF FACT.—Whether the loss set up by a common carrier is to be attributed to that inevitable necessity not arising from the intervention of man, and which no human prudence could have avoided, is a question of fact for a jury to decide. *Elliot v. Russell*, 306.

#### REAL ESTATE.

1. EFFECT OF RECOVERY FOR BREACH OF WARRANTY.—A grantee of land who recovers judgment and satisfaction against the grantor for a breach of the covenant of warranty, cannot afterwards recover the land granted on the grantor's acquiring a more perfect title. *Porter v. Hill*, 22.

2. **WHEN ENTRY ESSENTIAL.**—Where an estate of freehold is granted upon condition, and a breach occurs, the grantor must make an actual entry or claim in order to revest the estate. *Chalker v. Chalker*, 206.
3. **CLAIM.**—Bringing an action of disseisin is not a claim within the meaning of the law, nor is it a sufficient substitute for an entry. *Id.*
4. **WAIVER OF FORFEITURE.**—Where a forfeiture of an estate of freehold upon condition has taken place for non-payment of an annuity, an acceptance by the grantor of the sum due is a waiver of the forfeiture, which if once waived cannot afterwards be claimed. *Id.*
5. **WHEN POSSESSION NOT ADVERSE.**—A. entered into possession of land admittedly without title, and afterwards entered into a contract with T., who covenanted to give him a deed. T. had no title, and only claimed to hold under B. Thereafter, A. assigned the contract to S., who took possession thereunder, and afterwards received the deed from T. Subsequently he obtained a deed from B., the patentee and true owner. It was held that the original possession of A., being without title, was to be deemed the possession of B., the patentee, and that the possession of S., under the covenant from A. to T., was not adverse to B. so as to defeat a deed made by him during that possession. *Jackson v. Sharp*, 267.
6. **PRESUMPTIONS IN FAVOR OF TITLE.**—Every presumption should be made in favor of a possession in subordination to the title of the true owner; an adverse possession must be strictly and conclusively proved. *Id.*
7. **PRESUMPTIONS AS TO TITLE.**—Where a person died in possession of land and his son and heir at law succeeded to the possession and continued therein undisturbed for above eighteen years, it was held that a purchase of the title by the ancestor might be presumed; and where there was an order of the colony of New York, in 1764, for the survey of the lot in favor of a certain party, and which was made, but no patent founded thereon could be found, it was held that a patent to that person and a deed from him to the ancestor might be presumed for the sake of quieting the possession. *Jackson v. McCall*, 343.
8. **FAILURE TO CONVEY TITLE.**—Where by the conditions of the contract the purchaser is required to deposit part of the purchase-money, and the vendor is unable to convey a good title, pursuant to the articles, the purchaser may disaffirm the contract, and recover back his deposit. *Judson v. Wass*, 392.
9. **INCUMBRANCES.**—Where the contract provided that the conveyance was to be with warranty, except as to an incumbrance specified therein, the existence of an unsatisfied mortgage at the time the vendor should have conveyed, and although such mortgage was recorded, was held to exonerate the purchaser. *Id.*
10. **DEFICIENCY IN LAND SOLD.**—A sale was made of "three tracts of land containing nine hundred ninety-one and a quarter acres, and allowance at twelve shillings and six pence per acre." The vendor afterwards obtained patents in his own name, and executed a conveyance of the tracts to the vendee according to courses and distances as in the patents, and stating them as "containing in the whole nine hundred ninety-one and a quarter acres, and allowance, etc., be the same more or less." The vendee having previously paid a part of the purchase-money gave his

bonds to the vendor on the day after the conveyance, for the remainder of the purchase-money. Upon a survey made twelve years afterwards the tracts were ascertained to fall short eighty-eight acres. It was held that the vendee was not entitled to any deduction from his bonds, on account of the deficiency. *Smith v. Evans*, 436.

11. **DEFICIENCY IN LAND SOLD.**—In case of a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments, and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not. *Nelson v. Carrington*, 519.
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shipping of the return cargo, the Portland firm had executed a bill of sale to the plaintiffs, purporting to convey all the cargo then consigned as aforesaid. The vessel being detained by contrary winds after the shipment, the Liverpool firm heard of the failure of the Portland firm, and thereupon, by certain threats, induced the master to give up the bills of lading (excepting one which he delivered at Portland, which was indorsed to the plaintiff) and to sign other bills deliverable to the defendant or assigns, their agent. It was held in replevin, that the defendant must recover, as the Liverpool firm had so far a control over the goods after they had been placed on board, and the first set of bills of lading had been signed, as to give them a right to change their destination, or they might at least stop them in their transit; and that if the bill of sale to the plaintiffs could, in any event, operate to pass the property in the return cargo, it must be subject to the claims of the Liverpool firm. *Nesley v. Stubbs*, 29.

#### SURETYSHIP.

1. **SURETIES NOT DISCHARGED BY LACHES OF PUBLIC OFFICERS.**—An omission on the part of the accounting officers of the commonwealth for a year and upwards to compel the prothonotary of the common pleas to settle his account of fees, does not discharge the sureties in the official bond of the prothonotary, although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution. *Commonwealth v. Wolbert*, 452.
2. **VOLUNTARY BOND BINDING ON PUBLIC OFFICER.**—The bond of the prothonotary, though not required by any law, is nevertheless binding on him and his sureties as a voluntary bond; and being in the first place for the use of the commonwealth, a payment under it to an individual creditor of the prothonotary is at the peril of the surety. The commonwealth must be satisfied in the first instance to the amount of the penalty. *Id.*

#### TENANCY IN COMMON.

1. **TENANCY IN COMMON UNDER PROVISION IN WILL.**—A testator, after a devise of the surplus of his estate to his four sons, made the following bequest: "ITEM.—I will that one third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children." This was held a tenancy in common in the two daughters, and the children of the third, and not a joint-tenancy. *Martin v. Smith*, 394.
2. **RULE DETERMINING JOINT-TENANCY.**—Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint-tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intention that the estate should be divided, it then becomes a tenancy in common. *Id.*
3. **TIME RUNNING AGAINST TENANT IN COMMON.**—The possession of one tenant in common is the possession of the other, and the statute of limitations runs only against an adverse possession of the entire and undivided property, from the time of the actual ouster and adverse holding. *Coleman v. Hutchenson*, 649.



2. **NEW NOTE FOR A USURIOUS OBLIGATION.**—A promissory note was given in payment of a debt, the promisor agreeing to pay a usurious rate of interest. After sundry payments of interest at the rate agreed, and of part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note being in part paid, was also canceled, and a third note given for the balance. In an action by the indorsee of the latter note against the promisor, it was held not to be tainted with the usurious interest paid on the first note. *Chadbourn v. Watts*, 100.
3. **WHO AFFECTED BY USURY.**—A *bona fide* purchaser, without notice, under a sale made by virtue of a power of attorney contained in a mortgage is not affected by usury in the original contract. *Jackson v. Henry*, 328.
4. **USURY, BETWEEN ORIGINAL PARTIES.**—Though the statute against usury declares the usurious contract and security utterly void, yet this is only between the original parties on the instrument infected with usury. Where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defense of usury cannot be set up against such innocent purchaser. *Id.*  
See EVIDENCE, 11.

#### VERDICT.

**RELIEF AGAINST.**—Relief cannot be given against a verdict as being contrary to equity unless the plaintiff knew the fact to be different from what the jury have found it and the defendant was not aware of it at the time of trial; or where there was no jurisdiction at law; or where the verdict is obtained by fraud. *Gatlin v. Kilpatrick*, 557.

#### WILLS.

1. **WHEN CHARGE IN DEVISE CREATES A FEE.**—Where, in a devise, the payment of the testator's debts is charged upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee. Accordingly, where a father devised certain real estate to his two sons, to be equally divided between them, and added, "the debts to be paid out of my estate that I shall die seized of," it was held that the sons took an estate for life only. *Jackson v. Bull*, 321.
2. **CONSTRUCTION OF CLAUSE.**—Where, after sundry devises in fee, and bequests to his children exhausting the estate, the testator added, "if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children," it was held that the devise over applied to real as well as personal property, and was not confined to the bequests of the personal estate, immediately preceding this clause. It was also held that the devise over was good as an executory devise, and carried a fee, this limitation over necessarily referring to the estate before devised. *Jackson v. Staats*, 376.
3. **"CHILDREN" CONSTRUED.**—The word "children" in the above clause only applies to the testator's children living at the time of his death, and does not include grandchildren. *Id.*

4. CHARGE UPON AN ESTATE.—Charging the estate with the payment of money in the hands of the devisees, does not prevent its limitation over by way of executory devise. *Id.*
5. DEVISE TO GRANDCHILDREN.—A testator bequeathed two thousand pounds “to the children and grandchildren of his brother, I. P., deceased, excepting M. F. (a grandchild of I. P.) and her children, she and they not needing it, to be equally divided among those of them who may be then living (at the death of the testator’s widow), saving that his cousin, S. R., should have two shares thereof.” It was held that the great-grandchildren of I. P. took equally with the children and grandchildren; and that all who were alive at the death of the testator’s widow, whether born before or after the testator’s death, were entitled to take. *Pemberton v. Parke*, 432.
6. CONSTRUCTION OF TERM “HEIRS” IN DEVISE.—A testator devised: “I give and bequeath to the children of G. W. L., provided he has any, if not, to the heirs of my sister S., the land which lies between the road, etc.,” and it did not appear from the will that the testator knew of his sister S. being alive; it was held that the word “heirs” must be taken in its legal acceptance, and not as *descriptio personarum*. *Den v. Barnes*, 547.
7. ERROR IN A WILL IN DESCRIBING QUANTITY OF LAND.—Where a testator devised “to his grandson A. L. three hundred and fifty acres of land, being the upper part of a tract of seven hundred acres; and to his granddaughters P. L. and J. L. the lower part of the same tract, to be equally divided between them,” and the tract was found to contain in fact eleven hundred acres, it was held that the grandson was entitled to only three hundred and fifty acres, and the granddaughters to three hundred and seventy-five acres each. *Williams v. Lane*, 561.
8. OMISSION OF WORDS “MORE OR LESS” IMMATERIAL.—Describing a tract of land as containing a specific number of acres is the same as the description of a tract containing so many acres, more or less. *Id.*

## WITNESSES.

See EVIDENCE, 13.







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shipping of the return cargo, the Portland firm had executed a bill of sale to the plaintiffs, purporting to convey all the cargo then consigned as aforesaid. The vessel being detained by contrary winds after the shipment, the Liverpool firm heard of the failure of the Portland firm, and thereupon, by certain threats, induced the master to give up the bills of lading (excepting one which he delivered at Portland, which was indorsed to the plaintiff) and to sign other bills deliverable to the defendant or assigns, their agent. It was held in replevin, that the defendant must recover, as the Liverpool firm had so far a control over the goods after they had been placed on board, and the first set of bills of lading had been signed, as to give them a right to change their destination, or they might at least stop them in their transit; and that if the bill of sale to the plaintiffs could, in any event, operate to pass the property in the return cargo, it must be subject to the claims of the Liverpool firm. *Noley v. Stubbs*, 29.

#### SURETYSHIP.

1. **SURETIES NOT DISCHARGED BY LACHES OF PUBLIC OFFICERS.**—An omission on the part of the accounting officers of the commonwealth for a year and upwards to compel the prothonotary of the common pleas to settle his account of fees, does not discharge the sureties in the official bond of the prothonotary, although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution. *Commonwealth v. Wolbert*, 452.
2. **VOLUNTARY BOND BINDING ON PUBLIC OFFICER.**—The bond of the prothonotary, though not required by any law, is nevertheless binding on him and his sureties as a voluntary bond; and being in the first place for the use of the commonwealth, a payment under it to an individual creditor of the prothonotary is at the peril of the surety. The commonwealth must be satisfied in the first instance to the amount of the penalty. *Id.*

#### TENANCY IN COMMON.

1. **TENANCY IN COMMON UNDER PROVISION IN WILL.**—A testator, after a devise of the surplus of his estate to his four sons, made the following bequest: "ITEM.—I will that one third of the overplus to my three daughters, Margaret Carnahan, and Elizabeth Smith, and Mary Crosher, her part of that third to her children." This was held a tenancy in common in the two daughters, and the children of the third, and not a joint-tenancy. *Martin v. Smith*, 394.
2. **RULE DETERMINING JOINT-TENANCY.**—Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint-tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intention that the estate should be divided, it then becomes a tenancy in common. *Id.*
3. **TIME RUNNING AGAINST TENANT IN COMMON.**—The possession of one tenant in common is the possession of the other, and the statute of limitations runs only against an adverse possession of the entire and undivided property, from the time of the actual ouster and adverse holding. *Coleman v. Hutchenson*, 649.

4. **DIVISION AMONG CO-TENANTS.**—In a division of land among co-tenants it is not necessary that each should receive of the several parcels held; it is sufficient that the part of each is of equal value, though made up of entire tracts. *Hart v. Hawkins*, 666.

### TRESPASS.

1. **RIGHT OF TENANT TO MAINTAIN.**—A tenant entitled to the way-going crop, who enters and warns a third person against cutting it, may maintain trespass *quare clausum fregit* against the wrong-doer, notwithstanding he had previously to the trespass given up to his landlord possession of the farm in a part of which the crop was growing. *Stults v. Dickey*, 411.
2. **POSSESSION TO MAINTAIN.**—The owner of a chattel may maintain trespass for it, if, at the time of the injury, he have the right of present possession though the actual possession be in another. *Carson v. Noblet*, 554.

### TROVER.

- RIGHT TO MAINTAIN.**—A sheriff having attached personal chattels, a person to whom he delivers them for safe keeping is merely his servant, having no legal interest in the chattels, and cannot therefore maintain trover for them. *Ludden v. Leavitt*, 45.

### TRUSTS.

1. **NOTICE OF RESULTING TRUST.**—A father paid the purchase-money and took a deed in the name of his daughter, a minor, the deed expressing a consideration paid by him. He held possession of the premises for thirty-eight years. The daughter and her husband having surreptitiously obtained the deed, conveyed the property. It was held that the purchaser from her, for value, had notice of the resulting trust, and was guilty of fraud, and that a release to the father might be presumed. *Jackson v. Matadorf*, 355.
2. **PURCHASE BY TRUSTEE.**—A trustee can never be a purchaser upon a sale of the trust estate. *Dorsey v. Dorsey*, 506.

### USAGE.

- OF BANK.**—The well established usages and by-laws of a bank respecting demand and notice, are to be understood as forming a part of the contract with parties who have dealings with the bank. *Lincoln Bank v. Page*, 52.

### USURY.

1. **INTENT TO CONSTITUTE.**—A person being indebted to another in a sum upon which usurious interest was paid, it was agreed that a debtor of the former should assume this obligation. Accordingly, this party gave his promissory note to the creditor of the former for the debt, including the usurious interest, the amount of which note was, however, less than his own indebtedness, he paying the balance to his creditor, and being thus released. In an action upon this note, it was held that the transaction was not usurious, the jury finding no intent or contrivance to evade the statute. *Bearce v. Barstow*, 25.

2. **NEW NOTE FOR A USURIOUS OBLIGATION.**—A promissory note was given in payment of a debt, the promisor agreeing to pay a usurious rate of interest. After sundry payments of interest at the rate agreed, and of part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note being in part paid, was also canceled, and a third note given for the balance. In an action by the indorsee of the latter note against the promisor, it was held not to be tainted with the usurious interest paid on the first note. *Chadbourn v. Watts*, 100.
3. **WHO AFFECTED BY USURY.**—A *bona fide* purchaser, without notice, under a sale made by virtue of a power of attorney contained in a mortgage is not affected by usury in the original contract. *Jackson v. Henry*, 328.
4. **USURY, BETWEEN ORIGINAL PARTIES.**—Though the statute against usury declares the usurious contract and security utterly void, yet this is only between the original parties on the instrument infected with usury. Where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defense of usury cannot be set up against such innocent purchaser. *Id.*

See EVIDENCE, 11.

### VERDICT.

- RELIEF AGAINST.**—Relief cannot be given against a verdict as being contrary to equity unless the plaintiff knew the fact to be different from what the jury have found it and the defendant was not aware of it at the time of trial; or where there was no jurisdiction at law; or where the verdict is obtained by fraud. *Gatlin v. Kilpatrick*, 557.

### WILLS.

1. **WHEN CHARGE IN DEVISE CREATES A FEE.**—Where, in a devise, the payment of the testator's debts is charged upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee. Accordingly, where a father devised certain real estate to his two sons, to be equally divided between them, and added, "the debts to be paid out of my estate that I shall die seised of," it was held that the sons took an estate for life only. *Jackson v. Bull*, 321.
2. **CONSTRUCTION OF CLAUSE.**—Where, after sundry devises in fee, and bequests to his children exhausting the estate, the testator added, "if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children," it was held that the devise over applied to real as well as personal property, and was not confined to the bequests of the personal estate, immediately preceding this clause. It was also held that the devise over was good as an executory devise, and carried a fee, this limitation over necessarily referring to the estate before devised. *Jackson v. Staats*, 376.
3. **"CHILDREN" CONSTRUED.**—The word "children" in the above clause only applies to the testator's children living at the time of his death, and does not include grandchildren. *Id.*

4. CHARGE UPON AN ESTATE.—Charging the estate with the payment of money in the hands of the devisees, does not prevent its limitation over by way of executory devise. *Id.*
5. DEVISE TO GRANDCHILDREN.—A testator bequeathed two thousand pounds "to the children and grandchildren of his brother, I. P., deceased, excepting M. F. (a grandchild of I. P.) and her children, she and they not needing it, to be equally divided among those of them who may be then living (at the death of the testator's widow), saving that his cousin, S. R., should have two shares thereof." It was held that the great-grandchildren of I. P. took equally with the children and grandchildren; and that all who were alive at the death of the testator's widow, whether born before or after the testator's death, were entitled to take. *Pemberton v. Parke*, 432.
6. CONSTRUCTION OF TERM "HEIRS" IN DEVISE.—A testator devised: "I give and bequeath to the children of G. W. L., provided he has any, if not, to the heirs of my sister S., the land which lies between the road, etc.," and it did not appear from the will that the testator knew of his sister S. being alive; it was held that the word "heirs" must be taken in its legal acceptation, and not as *descriptio personarum*. *Den v. Barnes*, 547
7. ERROR IN A WILL IN DESCRIBING QUANTITY OF LAND.—Where a testator devised "to his grandson A. L. three hundred and fifty acres of land, being the upper part of a tract of seven hundred acres; and to his granddaughters P. L. and J. L. the lower part of the same tract, to be equally divided between them," and the tract was found to contain in fact eleven hundred acres, it was held that the grandson was entitled to only three hundred and fifty acres, and the granddaughters to three hundred and seventy-five acres each. *Williams v. Lane*, 561.
8. OMISSION OF WORDS "MORE OR LESS" IMMATERIAL.—Describing a tract of land as containing a specific number of acres is the same as the description of a tract containing so many acres, more or less. *Id.*

## WITNESSES.

See EVIDENCE, 12.







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